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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1957

DAVID E. PISEL AND EVELYN PISEL

Petitioners,

v.

ITT CONTINENTAL BAKING CO. AND ROBERT BRUBAKER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE STATE OF OHIO

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE STATE OF OHIO

INTRODUCTORY STATEMENT

David E. Pisel, and his wife, Evelyn Pisel, petition this Court for a writ of certiorari to review a judgment of the Supreme Court of the State of Ohio.

OPINION BELOW

The opinion of the Supreme Court of the State of Ohio is reported at 61 Ohio State 2d 142, appended hereto as Appendix A, pages 2a-11a.

JURISDICTION

The decision of the Supreme Judicial Court of the State of Ohio was entered on the 14th day of March, 1980, and is appended hereto as Appendix A, p. 12a. Jurisdiction of this Court is conferred by 28 U.S.C. §1257.

QUESTION PRESENTED

Whether the Ohio Supreme Court deprived petitioners of due process and denied them equal protection of laws by

1. reversing the lower Court's denial of respondent's motion for directed verdict on *one* of two pleaded alternative theories of liability, and
2. reversing the lower Court's judgment on the jury verdict rendered for petitioners on *both* theories of liability and entering final judgment on all issues for respondents, in contravention of, and without abandoning, Ohio's common law Two Issue Rule.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the Constitution of the United State provides at Section 1:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On November 1, 1973, petitioner David E. Pisel collided with respondents' truck resulting in amputation of his left leg. Petitioners charged the respondents with negligence, wanton misconduct, and wilful misconduct. The petitioners' Amended Complaint is found in Appendix B, pp. 2b-5b.

The trial court instructed the jury that the petitioner, David E. Pisel, was guilty of contributory negligence as a matter of law and under Ohio law could only return a verdict for the petitioners if they found the respondents guilty of either wanton misconduct or wilful misconduct.[1]

The jury returned a general verdict[2] in favor of petitioners in the sum of Two Hundred Fifteen Thousand Dollars ($215,000) which was therefore on the basis of either wanton misconduct *or* wilful misconduct.

The appellate court (Ohio Court of Appeals) affirmed the judgment with a unanimous decision on December 22, 1978.

The Ohio Supreme Court then reversed the Court of Appeals with a 4-3 decision but the "per curiam" decision addressed itself to only one of the two issues, i.e. wanton misconduct.

There were two separate and distinct issues submitted to the jury, either of which could sustain the verdict.

The Ohio Supreme Court has followed the Two Issue

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[1]In Ohio, proof of wilful or wanton misconduct overcomes contributory negligence, which, at the time of petitioners' trial, was ordinarily an absolute bar to recovery by a tort claimant.

Michalec v. Hutchison (1931) 123 Ohio St. 494
Y&S Ry. Co. v. Faulk (1928) 118 Ohio St. 480
Buell v. N.Y. Cent. Rd. Co. (1926) 114 Ohio St. 40

[2]The jury was not polled, nor were interrogatories propounded to the jury to determine the basis of their verdict. Thus, the verdict was a general one.

Rule in appellate procedure for over one hundred years and it is still in full force and effect and has not been abandoned.[3]

Yet the Ohio Supreme Court has chosen to ignore this well established principle of law to deprive this petitioner of his jury verdict of $215,000 which was a property right to these petitioners.

On February 6, 1980, the Supreme Court of the State of Ohio, in a "per curiam" decision of only four of the seven justices, reversed the lower Court and entered judgment for respondents on their motion for directed verdict. The Opinion, however, addressed only the issue of wanton misconduct, and not wilful misconduct, the alternate theory of liability submitted to the jury. The briefs of the parties addressed fully the issue of the Two Issue Rule. The "per curiam" opinion of the Ohio Supreme Court, however, failed in any way to take account of the Two Issue Rule. The issue was addressed only in a lengthy dissenting opinion.

On February 15, 1980, petitioners moved the Ohio Supreme Court for the reconsideration of its decision because of its failure to recognize the petitioners' alternative theory of liability upon which the jury was charged, and its failure to account for, by recognition, application, disapproval or overruling, the Two Issue Rule on Constitutional grounds. A copy of petitioners' motion for reconsideration is found in Appendix B, pp. 19b-42b. On March 17, 1980, the Court denied the motion for reconsideration without opinion, and remanded the case to the Richland County Court of Common Pleas for reversal and judgment for respondents. The Court's entry is found in Appendix A, p. 12a.

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[3]In Ohio, as in nearly every other State of the Union the Two Issue Rule provides that when a jury renders a verdict upon two separate alternative theories of liability, and the verdict is general, and not specific to either issue, error as to one such theory does not destroy the soundness of a judgment on the verdict. See Appendix B, pp. 5b-18b.

REASONS FOR GRANTING THE WRIT.

I.

THE WRIT SHOULD BE GRANTED BECAUSE THE DECISION OF THE OHIO SUPREME COURT DEPRIVED THE PETITIONERS OF PROPERTY WITHOUT DUE PROCESS OF LAW.

The basis for the Fourteenth Amendment guaranty of due process is the great concern expressed in the Fifth Amendment that the exercise of governmental power, whether executive, legislative or judicial, should not be arbitrary or capricious, but grounded in law. This concern has its roots in the determination of the builders of our nation to create a government of laws and not a government of men.

Although due process issues have traditionally arisen from legislative exercises of power, it is clear that exercises of power in other branches of government may infringe the due process rights of a person when, for example, he is deprived of a property right or a liberty interest by such exercise without reason and without an opportunity to meaningfully contest such exercise; that is, arbitrarily and without access to a remedy or a forum in which to pursue it. Certainly, that the possession of a cause of action is a property interest, and that access to the courts is a liberty interest, are beyond dispute.

An example of such a case is *Saunders v. Shaw* (1917) 244 U.S. 317, 61 L. Ed. 1163, 37 S. Ct. 638. The petitioner there was a water drainage district tax collector who had been made a party defendant to an action to enjoin his collection as to a property owner who claimed his property

was not benefited by the district. In that case the Louisiana Supreme Court, on a motion for rehearing, reversed a lower court decision for the petitioner which had been affirmed by the intermediate appellate court and even by itself on initial hearing. The basis of its decision on rehearing was an offer of proof by the respondent tax collector in the record, which was held inadmissible below, and which for that reason was unrebutted. The Louisiana Supreme Court then entered judgment on rehearing for the respondent tax collector. The U.S. Supreme Court held that the action of the State Supreme Court denied the petitioner due process in that it foreclosed his ability to prove facts upon which he could have prevailed below. Petitioner did not attempt to prove these facts below because he had no duty to do so in view of the legal holding rendering inadmissible the evidence offered by the respondent. The U.S. Supreme Court held that the petitioner was not required to do what he had no duty to do.

Applying the *Saunders* holding to the case of petitioners herein, it would appear that here there are even stronger reasons for a similar holding. Here there was *already* proof of facts upon which petitioners could have prevailed, and *did* prevail below. This proof was wholly ignored by the Ohio Supreme Court, along with the theory of liability at which the proof was aimed, without opinion or comment abandoning or disapproving wilful misconduct as a cause of action. Thus, the legal and beneficial result of petitioners' proof below was foreclosed by the action of a State Supreme Court seemingly blind to the record and to the common law of the State. For these reasons, the decision of the Ohio Supreme Court was unreasonable, arbitrary and capricious, and constituted a denial of petitioners' due process rights.

Saunders also addresses the issue of when a Constitutional claim must be made to be "in time" to serve as the

basis of a petition to the U.S. Supreme Court. In *Saunders,* the due process issue was *first* raised in a second motion for rehearing. It could not have been made earlier since the issue only arose when the Louisiana Supreme Court reversed all lower decisions, including its own, on the first motion for rehearing. The U.S. Supreme Court held that the issue was timely raised and pursued, as follows:

> The question remains whether the writ of error can be maintained. The record discloses the facts but does not disclose the claim of right under the Fourteenth Amendment until the assignment of errors filed the day before the Chief Justice of the State granted this writ. Of course, ordinarily, that would not be enough. But when the act complained of is the act of the Supreme Court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the aggrieved party in such a way could not come here. *The defendant was not bound to contemplate a decision of the case before his evidence was heard and therefore was not bound to ask a ruling or take other precautions in advance. The denial of rights given by the Fourteenth Amendment need not be by legislation.* [citation deleted] It appears that shortly after the Supreme Court had declined to entertain the petition for rehearing the plaintiff in error brought the claim of constitutional right to the attention of the chief justice of the state by his assignment of errors. We do not see what more he could have done. *Saunders v. Shaw* (above) 244 U.S. 317 at 320.

In the case of petitioners herein, the Constitutional issue was first raised in the motion for reconsideration because, as in *Saunders,* it could not have been raised earlier. Petitioners were not in a position to do more than they did.

In Ohio as in nearly every other State, there exists a common law principle known as the Two Issue Rule. This

rule provides that when a jury renders a verdict upon two separate alternative theories of liability, and the verdict is general, and not specific to either issue, error as to one such theory does not destroy the soundness of a judgment on that verdict. This rule has long standing in the common law of Ohio, as shown in Appendix B, pp. 5b-18b.

In the case of petitioners herein, the Two Issue Rule has clear applicability. The verdict was rendered on charges of *both* wanton misconduct *and* wilful misconduct, and reversible error with respect to wanton misconduct should not have destroyed the verdict. Precisely the effect, however, of the decision of the Ohio Supreme Court was to destroy the verdict. This was done in a manner inconsistent with the common law as enunciated in Ohio for more than one hundred years, without opinion or comment abandoning or disapproving that rule. The Two Issue Rule is still in force and effect in Ohio, and has not been abandoned.

The U.S. Supreme Court has defined and given meaning the phrase "deprived of property without due process" in similar circumstances as follows:

> . . . within the meaning of the [Fourteenth] Amendment, a deprivation of property without due process of law occurs when it results from the arbitrary exercise of power, inconsistent with "those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having them acted on by them after the settlement of this country." [citation deleted]
>
> *Tracy v. Ginzberg* (1907), 205 U.S. 170 at 178, 51 L.Ed. 755 at 760, 27 S.Ct. 461.

Although the *Ginzberg* case holds contrary to the holding sought here, it is important to point out that the U.S.

Supreme Court recognized there that the state court in fact respected "those settled usages and modes of proceeding". Further, the decision reviewed in *Ginzberg* was attended by findings of fact and conclusions of law. Here no law or reason was given for the contravention of the Two Issue Rule, nor was that rule even commented upon in the "per curiam" opinion of the Ohio Supreme Court. Neither the Two Issue Rule, nor the common law tort wilful misconduct was abandoned or disapproved. Under the language of *Ginzberg*, and its analysis of circumstances similar to those of petitioners herein, in light of the Fourteenth Amendment due process clause, it would appear that the Ohio Supreme Court has engaged in an arbitrary exercise of power which has denied petitioners the lawful consequence of their day in court; that is, the Ohio Supreme Court has denied petitioners their right of due process.

II.

THE WRIT SHOULD BE GRANTED BECAUSE THE DECISION OF THE OHIO SUPREME COURT DENIED THE PETITIONERS EQUAL PROTECTION OF THE LAWS.

The concept of equal protection of laws arises out of the same concern as the concept of due process, that our government should be one of laws and not of men. The meaning and the purpose of equal protection is simply stated:

> "The equal protection clause of the Federal Constitution means that the rights of all persons must rest upon the same rule under similar circumstances, and applies to the exercise of all the powers of a State which can

effect the individual or his property. . . ."
Louisville Gas & Electric Co. v. Coleman (1928) 277 U.S. 32, 72 L. Ed. 770, 48 S.Ct. 423

"The purpose of the clause in the Federal Constitution in respect to equal protection of laws is to rest rights of all persons upon the same rule under similar circumstances."
Frost v. Corporation Com. of Oklahoma (1929) 277 U.S. 515, 73 L.Ed. 483, 49 S.Ct. 235.

It is clear that the requirement of state action, the prerequisite of any claim under the Equal Protection Clause, is met here, as in other cases, by the acts of the judicial branch of a state government. *Cooper v. Aaron* (1958) 358 U.S. 1, 3 L.Ed. 2d 5, 78 S.Ct. 1401. Although the *Cooper* case concerned racial discrimination, where the rigor of the test applied is substantially different, many of the principles it comments upon are applicable to any equal protection problem. The Cooper opinion provides as follows on the issue of "state action":

"The controlling legal principles are plain. The command of the Fourteenth Amendment is that no "State" shall deny to any person within its jurisdiction the equal protection of the laws. A State acts by its legislative executive, *or its judicial authorities.* It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever by virtue of public position under a State government . . . denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's powers, his act is that of the State. This must be so, or the constitutional prohibition has no meaning." [citation deleted] *Thus the prohibitions of the Fourteenth*

> *Amendment extends to all action of the State denying equal protection of the laws; whatever the agency of the State taking the action,* [citations deleted] *or whatever the guise in which it is taken,* [citations deleted]." *Cooper v. Aaron* (1958) 358 U.S. 1 at 16, 3 L.Ed. 2d 5 at 16, 78 S.Ct. 1401. (emphasis supplied)

In the case of petitioners herein, the action of the Ohio Supreme Court fits easily into the meaning and purpose of the Equal Protection Clause. Petitioners have been denied the equal protection of two common law principles of long standing in the State of Ohio. Their complaint sounding in tort included the common law tort of wilful misconduct. At the trial of the issues, evidence was offered and admitted on wilful misconduct, along with wanton misconduct, the jury was charged on wilful misconduct, and a verdict thereon was obtained. The Ohio Supreme Court reversed the judgment of the trial court, as affirmed by the intermediate appellate court, and entered judgment in all respects for respondents.

The effect of the reversal by the Ohio Supreme Court was to deny to petitioners the benefit and protection of Ohio laws with respect to wilful misconduct, without the merest indication of an abandonment or disapproval of those laws. Today in Ohio the laws respecting wilful misconduct are still in force and effect, and are being applied and given effect in courts of law for the benefit of other Ohio residents before them in similar circumstances. Petitioners have been singled out, among other citizens of the State, for different treatment under the State's laws respecting wilful misconduct.

Petitioners have been likewise denied by the Ohio Supreme Court's reversal the benefit and protection of the Two Issue Rule, discussed above. (See footnote no. 3, and Appendix B pp. 5b-18b.) Again, the Supreme Court failed to indicate an abandonment or disapproval of the Rule. Today in Ohio, the Two Issue Rule is still in force and in effect, and

is being applied and given effect in courts of law for the benefit of other Ohio residents before them in similar circumstances. Petitioners have been singled out, among all other citizens of the State, for different treatment under the State's Two Issue Rule.

Although under prior decisional law of the U.S. Supreme Court, a state's supreme court is the final arbiter of that state's common law, that is *not* this case. The Ohio Supreme Court has not, in petitioners' case, or any other, altered Ohio common law with respect to wilful misconduct or the Two Issue Rule. Were that the case, petitioners acknowledge that they would have no grounds for this petition. Similarly, if this court accepts certiorari and remands the case to the Ohio Supreme Court for rehearing, and if that Court abandons wilful misconduct or the Two Issue Rule, petitioners would similarly lack the grounds outlined herein.

Even when the least stringent test of denial of equal protection is applied to these facts, it is clear that such denial has been perpetrated. Clearly, there is here no rational relation whatever between the singling out of these petitioners for special treatment under the laws of Ohio and any conceivable legitimate or appropriate judicial interest or goal.

CONCLUSION

For all of the reasons stated above, the questions raised by petitioners' case beg to be heard. The judiciary of each State in the Union is entitled to great deference when under the scrutiny of the Federal judiciary, considering the traditional and continuing importance of the ideal of Federalism. In this case, however, the Ohio Supreme Court has exceeded the

bounds of such deference in openly and wholly ignoring Ohio law applicable to these petitioners.

Petitioners respectfully request that the U.S. Supreme Court accept jurisdiction of this controversy.

Respectfully submitted,

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Appendix A

OPINION OF THE SUPREME COURT OF OHIO AND ENTRY DENYING PETITIONERS' MOTION FOR REHEARING

JANUARY TERM, 1980.

Opinion *Per Curiam.*

PISEL ET AL., APPELLEES, *v.* ITT CONTINENTAL BAKING COMPANY ET AL., APPELLANTS.

[Cite as Pisel v. Baking Co. (1980), 61 Ohio St. 2d 142.]

Negligence—Motor vehicles—Wanton misconduct, construed—Directed verdict—Erroneously denied, when.

(No. 79-201—Decided February 6, 1980.)

APPEAL from the Court of Appeals for Richland County.

This cause arose from an action instituted by appellees herein, David E. and Evelyn Pisel, against appellants, ITT Continental Baking Co. and Robert Brubaker, seeking damages resulting from a collision occurring between David Pisel's motorcycle and the baking company's truck driven by its employee, Brubaker. At the close of appellees' case, appellants moved for a directed verdict. The trial court denied appellants' request and submitted the cause to the jury, which found in appellees' favor. Judgment was entered upon the verdict.

The Court of Appeals for Richland County affirmed the judgment of the trial court, and the cause is now before this court pursuant to the allowance of a motion to certify the record.

Messrs. Zidar, Morgan & Tolaro and *Mr. Alfred J. Tolaro,* for appellees.

Messrs. Baran & Baran, Mr. Gregory C. Baran and *Mr. Edward C. Baran,* for appellants.

Per Curiam. Appellants' major challenge in the cause at bar stems from the trial court's refusal to grant their motion for a directed verdict. Appellants argue that the trial court erred when it submitted the instant cause to the jury on the question of whether Brubaker's (hereinafter "appellant") behavior amounted to wanton misconduct.

A perusal of the evidence in the manner required by Civ. R. 50(A)(4) * demonstrates that on November 1, 1973, at

* Civ. R. 50(A)(4) provides:

"(A) Motion for directed verdict.* * *

"(4) When granted on the evidence. When a motion for a directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any deter-

about 7:15 p.m., after darkness had descended, David Pisel (hereinafter "appellee") was operating his motorcycle westerly on U. S. Route 30 in Mansfield, Ohio. Route 30 is an unlighted four-lane highway separated by a concrete barrier. Appellee was traveling in the left lane, and was wearing a helmet with an amber-tinted face mask. Appellee testified that the mask had the effect of "darkening" lights when he wore it at night. His speed was approximately 50 miles per hour and his lights were on. As appellee approached his intended exit, he glanced backward over his shoulder in order to move into the right lane. He was unable, however, to change lanes due to the traffic in that lane. When he again focused his vision forward, appellee observed a truck resting sideways in his lane. Unable to stop in time, appellee crashed into the truck and sustained injuries which resulted in the amputation of his left leg.

During trial, the evidence demonstrated that approximately ten to fifteen minutes prior to appellee's collision, appellant's truck had been involved in an accident with an automobile. Although the truck was operable, appellant did not remove it from the westbound, left lane of travel. Both vehicles were left in the highway until the police could arrive to prepare an accident report. After the collision, however, the truck's headlights, tailights, and clearance lights were left on by appellant. When a witness arrived at the scene, appellant requested that the police be summoned. While awaiting arrival of the authorities, appellant remained with the vehicles and began to direct the flow of traffic around the wreckage. The evidence is in dispute with respect to whether appellant was using a flashlight to direct other travelers as appellee arrived at the scene. When appellant observed appellee's motorcycle approaching, he began waiving his arms in an attempt to warn him of the obstruction.

"Wanton misconduct" has most recently been discussed by this court in *Hawkins* v. *Ivy* (1977), 50 Ohio St. 2d 114, 363 N.E. 2d 367, wherein the syllabus states:

"Where the driver of an automobile fails to exercise *any*

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minative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue."

care whatsoever toward those to whom he owes a duty of care, and his failure occurs under circumstances in which there is great probability that harm will result, such failure constitutes wanton misconduct.***" (Emphasis added.)

Applying this rule to the facts at bar, it is clear that appellant's actions did not amount to "wanton misconduct." The defendant in *Hawkins* failed to exercise any care whatsoever. In the instant cause, appellant acted to protect other motorists from the potential danger of the blocked thoroughfare. *Baab* v. *Shockling* (1980), 61 Ohio St. 2d 55,—N.E. 2d—.

The judgment of the Court of Appeals is reversed and final judgment is entered for appellants.

Judgment reversed.

HERBERT, LOCHER and HOLMES, JJ., concur.

P. BROWN, J., concurs in the judgment.

CELEBREZZE, C. J., W. BROWN and LYNCH, JJ., dissent.

LYNCH, J., of the Seventh Appellate District, sitting for SWEENEY, J.

WILLIAM B. BROWN, J., dissenting. In the instant cause, the majority does not merely apply *Hawkins* v. *Ivy* (1977), 50 Ohio St. 2d 114. Rather, it sanctions a somewhat different approach to the issue of wanton misconduct with which I disagree. In *Hawkins,* we held that where the probability of harm was great, a tortfeasor's complete failure "to exercise any care whatsoever" constituted wanton misconduct, entitling a *plaintiff* to a directed verdict. Here, the majority reads *Hawkins* to imply that a similar *tortfeasor* is himself entitled to a directed verdict where such a complete failure to exercise any care is absent.

I agree with *Hawkins* insofar as it establishes that an appropriate demonstration of a tortfeasor's complete failure to exercise any care is sufficient to direct a verdict for a plaintiff on the issue of wanton misconduct. I do not agree with the majority that a plaintiff should be required to offer evidence tending to show a tortfeasor's *complete* failure to exercise any care in order to survive a tortfeasor's motion for a directed verdict. In the majority's view, a tortfeasor need on-

ly show that he lifted a finger in order for his motion for a directed verdict to be granted. Surely, the issue of wanton misconduct cannot be determined without considering the precise interests compromised by the tortfeasor's conduct.

Moreover, the approach that the majority adopts makes it virtually impossible for a plaintiff to prevail on this issue. Contributory negligence has thus become, in effect, a defense to "wanton" misconduct, as well as to negligence. It should not be so easy for tortfeasors to escape liability.

CELEBREZZE, C. J., and LYNCH, J., concur in the foregoing dissenting opinion.

LYNCH, J., dissenting. The majority opinion's decision is based on the sole question of whether the behavior of defendant Brubaker amounted to wanton misconduct. The trial court properly charged the jury on wanton misconduct, pursuant to *Hawkins* v. *Ivy* (1977), 50 Ohio St. 2d 114, but it also gave the following charge on wilful misconduct:

"Wilful misconduct is intentionally doing that which is wrong or intentionally failing to do that which should be done. The circumstances must also disclose that the defendant knew or should have known that such conduct would probably cause injury to the plaintiff. Wilful misconduct implies an intentional disregard of a clear duty or of a definite rule of conduct; a purpose not to discharge such duty, or a purpose to perform wrongful acts with knowledge of the likelihood of resulting injury. It is purposeful action or purposeful failure to act as differentiated from neglect to act."

Defense counsel made no objection to the trial court's charge on wilful misconduct; therefore, it is the law governing this question in this case.

A construction of the evidence adduced at trial most strongly in plaintiffs' favor, pursuant to Civ. R. 50(A)(4), shows that the subject accident occurred at approximately 7:15 P.M. on November 1, 1973, after darkness had descended, on U. S. Route 30 in Mansfield, Ohio, which was an unlighted limited access, divided four-lane highway; that ten to fifteen minutes prior to subject accident, defendants' truck had been involved in a minor accident with an automobile and was operable; that, during this time, defendants' truck was

left parked sideways across the left passing lane of such highway in violation of R. C. 4511.68(P); that although the lights on defendants' truck were left on, they were not discernible to approaching traffic because such lights were directed away from approaching traffic because of the position of defendants' truck on such highway; that defendants' truck was not equipped with either flares, reflectors or fusees in violation of R. C. 4513.27; that defendant Brubaker did not place either lighted fusees, red electric lanterns or red reflectors at the traffic side of his vehicle, and at a distance of 40 paces or approximately 100 feet from his vehicle on the traffic side in violation of R. C. 4513.28; that defendant Brubaker did not exhibit a white or amber light on the roadway side that was visible from a distance of 500 feet to the front of his vehicle and a red light visible 500 feet to the rear, in violation of R. C. 4513.10; that when defendant Brubaker saw plaintiff's motorcycle approaching, he began waiving his arms in an attempt to warn plaintiff of the obstruction in the highway caused by his truck; that defendant Brubaker was so close to his truck while doing this that plaintiff saw defendants' truck before he saw Brubaker; that plaintiff's speed was approximately 50 miles per hour and his lights were on; that when plaintiff saw defendants' truck, he was unable to stop in time and crashed into the truck; and that plaintiff sustained injuries which resulted in the amputation of his left leg.

This court has held that the leaving of a motor vehicle at night across or in the travel lane of a highway, where the driver thereof fails to exercise any care whatsoever to other users of the highway, is a reckless and inexcusable disregard of the rights of other motorists on such highway. *Hawkins* v. *Ivy, supra; Kellerman* v. *J. S. Durig Co.* (1964), 176 Ohio St. 320; *Reserve Trucking Co.* v. *Fairchild* (1934), 128 Ohio St. 519.

The majority opinion apparently attaches no significance to the fact that the subject accident occurred on a limited access highway. The writer believes that this fact is pertinent to the decision in this case.

A limited access highway is one especially designed for through traffic, over which abutters have no easement or right of access, so as to eliminate cross traffic of vehicles

(R. C. 5535.02, 4511.01[CC]). Access to such highway may be allowed only at highway intersections designated by the Director of Transportation (R. C. 5511.02). Pedestrians, except in emergency situations, and slow vehicles are prohibited within the limits of a freeway (R. C. 4511.051). Except for some specific exceptions which are not applicable to this case, no person shall park a vehicle on the roadway portion of a freeway, expressway or thruway (R. C. 4511.68[P]).

A limited access highway is designed and constructed at a considerable cost to the general public so that reasonably prudent drivers on such highways can drive at a higher rate of speed than can be done on ordinary roads because of the elimination of cross traffic and of slow vehicles from such highways. This is a considerable advance in the technology of building roads from the two-lane roads that generally existed at the time this court decided *Smiley* v. *Arrow Spring Bed Co.* (1941), 138 Ohio St. 81. There are still many two-lane roads in Ohio, and the *Smiley* case is still valid law as applied to accidents arising on such highways. However, the effect of the *Smiley* case is to slow down traffic in anticipation of recognized traffic hazards. The design of limited access roads is intended to eliminate as many of the recognized traffic hazards as possible. The writer believes that a comparable advance in the technology of the law in its application to motor vehicle accidents on limited access highways requires a recognition of an inherent conflict with the legal principle enunciated in the *Smiley* case and the legislative intent of the applicable statutes to limited access highways.

Thus, the facts of cases involving motor vehicle accidents on limited access highways should be distinguished from the facts of the *Smiley* case. The writer's opinion is that a new principle of law applicable to such cases should be developed.

In the instant case, the trial court instructed the jury that plaintiff was negligent as a matter of law; that plaintiff's own negligence in the operation of his motorcycle was a direct cause of the subject accident, and that the only question before the jury was whether defendants were liable because of wilful and wanton misconduct of defendant Brubaker.

In this case, plaintiff was driving his motorcycle on a limited access road at a speed of approximately 50 miles per

hour, which was a lawful and reasonable rate of speed for this highway. Plaintiff had the right to assume that defendants would obey the laws and would either remove defendants' truck from its dangerous position on the highway or place warning lights of such brightness or at such a distance from the truck so as to adequately warn approaching motorists (such as plaintiff) of the obstruction in the highway caused by the truck being parked across such highway. In this case defendant Brubaker did not comply with such statutes, and did not warn plaintiff in sufficient time to enable plaintiff to stop his motorcycle at the speed at which he was traveling.

Although the issue is not before this court, the writer believes that there is a serious question of whether plaintiff's negligence was the proximate cause of such accident. Under the facts of this case, the writer's opinion is that the most probable cause of such accident was the action of defendant Brubaker in leaving his operable truck parked sideways across the passing lane of a limited access highway without complying with the statutory requirements of warning approaching traffic by visible lights. The writer concurs with Justice William B. Brown's dissent from the majority opinion on the application of *Hawkins* v. *Ivy, supra,* on the issue of wanton misconduct to the facts of this case. However, the writer further concludes that such actions of defendant Brubaker were grossly irresponsible and amounted to wilful misconduct.

Defendant Brubaker admitted that he knew that the position of his truck on an unlighted, limited access highway was dangerous and hazardous. In effect, he admitted that the position of his truck on such highway created a situation where there was a great probability that approaching traffic would run into his truck, resulting in serious personal injury, death or damage.

After his first accident, Brubaker had sufficient time to remove his truck from its dangerous position on the highway as he was required to do pursuant to R. C. 4511.68(P). Brubaker made the deliberate decision not to remove his truck from this highway but to await the arrival of the police whom a witness, who arrived at the scene, summoned on his C. B. radio. R. C. 4549.02 requires a person involved in an ac-

cident to stop at the scene of the accident and to supply certain information, but there is no statutory requirement that a motor vehicle involved in an accident remain in the same position until the police arrives. To do so is helpful for the police accident report and to the party involved in the accident, but in the instant case the leaving of defendants' truck parked across the passing lane of a limited access highway was not done with any consideration of the rights of approaching motorists.

When Brubaker made this decision not to remove his truck until the police arrived, he knew that he was on a limited access highway where drivers would drive at a greater speed than on ordinary roads; that his truck did not have either flares, reflectors or fusees as required by R. C. 4513.27 and that he could not comply with R. C. 4513.28.

His final and dangerous misconduct was his failure to comply with the statutory requirements to warn oncoming traffic of the obstruction of the highway by the presence of his truck on such highway. He had the choice to turn his truck so that the lights faced oncoming traffic, rather than being directed away from such traffic, or to walk down the highway with a flashlight or some other discernible light to a sufficient distance so as to warn oncoming traffic of such obstruction. It is to be noted that R. C. 4513.28 requires that lighted fusees, red electric lanterns or red reflectors be placed at a distance of 40 paces or approximately 100 feet from a disabled truck. This is the only statutory standard that has come to the writer's attention for this purpose.

The writer is aware that standing on a limited access highway waving a flashlight at night is hazardous to the person doing so for the same reason as leaving a truck parked across the travel lane of such highway. However, the statutes impose a duty on a person whose truck is parked on a travel lane of a limited access highway to either remove such vehicle or to adequately and timely warn other motorists approaching such vehicle of the presence of the obstruction on such highway caused by the parking of such truck on such highway.

The writer's conclusion is that the overwhelming motivation for the actions of defendant Brubaker was his concern to

protect the property interest of his employer, defendant ITT Continental Baking Company, rather than any actual care for approaching traffic. His decision to leave his operable truck parked across the travel lane of an unlighted limited access highway until the police arrived clearly supports this conclusion. Defendant Brubaker had time to talk to the driver of the automobile with whom he had the first accident to obtain information from her but he did not utilize the available ten to fifteen minutes to comply with the applicable statutes as to warning approaching traffic by placing lights of sufficient brightness or at a sufficient distance from his truck to allow approaching traffic to stop in time to avoid a collision with his truck. Instead, he stood in the vicinity of his truck. As plaintiff was approaching defendants' truck at a rate of speed at which he was unable to stop in time to prevent his crashing into the truck, defendant Brubaker waved his arms to attract plaintiff's attention to the obstruction caused by his truck on the highway. By that time plaintiff had already seen the obstruction and Brubaker's action in waving his arms was ineffectual in preventing the subject accident. The only effect of such action by Brubaker was that plaintiff turned his motorcycle to the right and hit the front bumper of defendants' truck instead of hitting such truck broadside, thus minimizing the damage to defendants' truck.

The number of highway accidents in Ohio resulting in serious personal injuries and death is a matter of general knowledge and concern. Regardless of what decisions courts make regarding highway accident cases, highway accident casualties will continue. However, judges play a role in shaping the law so as to exercise some control over highway accidents. This court enunciated the legal principle in the *Smiley* case in an effort to prevent accidents.

However, in the writer's opinion the strict application of the *Smiley* case to the facts of this case will cause more accidents rather than prevent them. In the writer's opinion the action of defendant Brubaker in leaving his operable truck on an unlighted limited access highway, when he had sufficient time to remove such truck, without complying with the applicable statutes as to placing warning lights directed to approaching traffic predictably would result in an accident such

as occurred in this case. The writer submits that the proper test is the question of what was the proximate cause of such accident. Under the present state of the law and under the facts of this case, the writer agrees with both the trial court and the Court of Appeals that the question of whether Brubaker's actions amounted to wilful and wanton misconduct was properly submitted to the jury.

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbia.

1980 TERM

David E. Pisel et al.,
Appellees,

To wit: March 14, 1980

vs.

No. 79-201

ITT Continental Baking Co.,
et al.,
Appellants.

REHEARING

It is ordered by the court that rehearing in this case is denied.

I, THOMAS L. STARTZMAN, of Clerk the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. _____ Page ____

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 14th day of March 1980

THOMAS L. STARTZMAN
_____ Clerk.

By _____ Deputy.

Appendix B

AMENDED COMPLAINT OF THE PETITIONERS.

EXCERPTS FROM OHIO JURISPRUDENCE 2d ON THE TWO ISSUE RULE.

PETITIONERS' MOTION FOR RECONSIDERATION.

IN THE COURT OF COMMON PLEAS
RICHLAND COUNTY, OHIO

DAVID E. PISEL, and
EVELYN PISEL
2112 Springmill North Road
Mansfield, Ohio

Plaintiffs

-vs-

ITT CONTINENTAL BAKING CO.
West Fourth Street
Mansfield, Ohio

and

ROBERT BRUBAKER
2793 Hillcrest Drive
Mansfield, Ohio

and

BARBARA SHABAN
1567 Evergreen Avenue
Mansfield, Ohio

Defendants

and

B & S PLASTICS, INC.
11433 Phillips Highway
Jacksonville, Florida

and

* Case No. 75-313

* Amended Complaint and Jury Demand With New Parties Defendant

JOSEPH A. ARMSTRONG f.d.b.a.
UNITED MOTOR SALES *
586 Michigan Avenue
Mansfield, Ohio ***
New Parties Defendant *

CLAIM I

(1) After having first duly obtained leave of court to file his Amended Complaint and make New Parties Defendant, Plaintiff David E. Pisel says that on or about November 1, 1973, in the night season, he was operating his Honda motor vehicle in a westerly direction on State Route 30 in the City of Mansfield, Ohio, when suddenly and without warning, a motor truck owned by the Defendant, ITT Continental Baking Co., appeared in his path of travel, parked perpendicular to the roadway in the high speed lane of the highway.

(2) Plaintiff says further that the truck had been operated by Robert Brubaker in the course and scope of his employment with the ITT Continental Baking Co., and that it had become disabled as a result of the negligence of Defendant, Barbara Shaban, in colliding with it, and willfully and wantonly left by the Defendants blocking the high speed passing lane of the highway without warning devices in violation of Section 4513.28 of the Ohio Revised Code and without regards of the safety and rights of others lawfully using the roadway.

(3) Plaintiff says further that at the time of the within incident, he was wearing an amber colored shield that was produced and distributed by Defendant, B & S Plastics, Inc., and sold by the Defendant Joseph A. Armstrong, and that they were negligent in failing to give warning to their ultimate

consumer and user that these shields were not fit for use at night inasmuch as they cause dim objects to be less discernable and therefore created a safety hazard to the wearer.

(4) As a direct and proximate result of Defendants' negligence and willful and wanton misconduct, Plaintiff collided with the said motor truck sustaining great injury to his mind and body and great economic loss in the form of hospital and medical expenses and loss of income. It further resulted in the amputation of his left leg which has diminished his loss of enjoyment for life, all to his damage.

CLAIM II

(1) Plaintiff Evelyn Pisel for her claim realleges the facts set forth in Claim I and says further that she is the duly wedded wife of Plaintiff David E. Pisel and that as a proximate result of Defendant's negligence and willful and wanton misconduct has been deprived of her husband's consortium.

WHEREFORE, Plaintiff David E. Pisel demands Judgment against the Defendants in the sum of One Million Five Hundred Thousand Dollars ($1,500,000.00) on his claim and Plaintiff Evelyn Pisel demands Judgment against the Defendants in the sum of Three Hundred Thousand Dollars ($300,000.00) plus the costs of this action and for a trial by jury.

ALFRED J. TOLARO
Attorney for Plaintiffs
510 Leader Building
Cleveland, Ohio 44114
771-7250

SERVICE

A copy of the within Amended Complaint has been served upon the Defendants ITT Continental Baking Co., and Robert Brubaker by mailing a copy of same to their attorney, Edward C. Baran, 505 Richland Trust Building, Mansfield, Ohio; and Defendant Barbara Shaban by mailing a copy to her attorney, Micki Chattman, 44 Park Avenue W., Mansfield, Ohio, this _____ day of _____, 1975 by ordinary United States mail, postage prepaid.

ALFRED J. TOLARO
Attorney for Plaintiffs

OHIO JURIS PRUDENCE 2d

§831. Error Affecting Only One of Several Issues; the "Two-Issue" Rule.—It is well settled that where the jury returns a general verdict in a case involving two or more issues, a finding upon any one of which in favor of the successful party would entitle him to judgment, if the record does not disclose affirmatively by answers to interrogatories or otherwise upon which issue such verdict was based, the judgment will not be reversed if no error appears as to any one or more of them although there may be error as to other issues.[19] This is known in jurisprudence as the "two-issue"

[19]Sites v. Haverstick, 23 OS 626; Tod v. Wick Bros. 36 OS 370; Beecher v. Dunlap, 52 OS 64, 38 NE 795, followed without op in Cummings v. Ritter, 52 OS 673, 44 NE 1134, and National Union v. Rothner, 57 OS 679, 50 NE 1131; McAllister v. Hartzell, 60 OS 69, 53 NE 715; Goldenberger v. Ryan, 62 OS 643, 58 NE 1099; State ex rel. Lattanner v. Hills, 94 OS 171, 113 NE 1045, LRA1917B 684; Niemes v. Niemes, 97 OS 145, 119 NE 503; Jones v. Erie R. Co. 106 OS 408, 140 NE 366; Ochsner v. Cincinnati Traction Co. 107 OS 33, 140 NE 644; Hubert v. Kessler, 108 OS 584, 142 NE 38; Petrich v.

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Pennsylvania-Ohio Electric Co. 109 OS 636, 144 NE 611; Fourth & C. Trust Co. v. Rowe, 122 OS 1, 170 NE 439; Knisely v. Community Traction Co. 125 OS 131, 180 NE 654; Binder v. Youngstown Municipal R. Co. 125 OS 193, 180 NE 899; Kihlken v. Barber, 129 OS 485, 196 NE 164, 2 O Ops 483; Swoboda v. Brown, 129 OS 512, 196 NE 274, 2 O Ops 516 (recognizing general principle, but holding two-issue rule inapplicable to save the general verdict in the instant case); Youngstown Municipal R. Co. v. Mikula (1936) 131 OS 17, 1 NE2d 135, 5 O Ops 288; Will v. McCoy (1939) 135 OS 241, 20 NE2d 371, 14 O Ops 85; Leonardi v. A. Habermann Provision Co. (1944) 143 OS 623, 56 NE2d 232, 28 O Ops 511; Bush v. Harvey Transfer Co. (1946) 146 OS 657, 67 NE2d 851, 33 O Ops 154; Soltz v. Colony Recreation Center (1949) 151 OS 503, 87 NE2d 167, 39 O Ops 322; Brown v. Dusha, 1 O App 232, 20 OCC NS 310, 35 OCC 437, affd without OP 89 OS 403, 106 NE 1047; Fruit Dispatch Co. v. Lisey, 4 O App 300, 22 OCC NS 7, 38 OCC 496; O'Grady v. Newark, 6 O App 388, 27 OCA 247, 39 OCC 95; A. F. Waite Taxi & Livery Co. v. McGrew, 16 O App 219; O'Day v. Shouvlin, 17 O App 62, affd 104 OS 519, 136 NE 289, 25 ALR 980; Franklin Bond & Invest. Co. v. Long, 18 O App 235, 21 OLR 507; Buschelmann v. Cincinnati, 18 O App 346; State Sav. & T. Co. v. Grady, 20 O App 385, 153 NE 238, mco 21 OLR 153; Hirshberger v. Sinning, 21 O App 17, 152 NE 908; Mulvihill v. Frohmiller, 21 O App 210, 153 NE 115; Kronenberg v. Whale, 21 O App 322, 153 NE 302, mco 23 OLR 609; Tillman v. Toledo, 23 O App 442, 157 NE 120, mco 25 OLR 97; Remix v. Sisler, 24 O App 162, 156 NE 240, mco Remix v. Cleveland Trust Co. 24 OLR 456; Hodnicki v. Pere Marquette R. Co. 25 O App 124, 158 NE 496; Jasionowski v. Industrial Commission, 25 O App 319, 158 NE 195, mco 25 OLR 175; Cleveland R. Co. v. Duralia, 30 O App 389, 165 NE 358, 28 OLR 231, mco Feb. 20, 1929; Matis v. Woodruff, 31 O App 73, 166 NE 203, 6 OL Abs 118, mco March 28, 1928; Harris v. Stoley, 31 O App 533, 166 NE 428; Columbus R. Power & L. Co. v. Lombard, 33 O App 47, 168 NE 619; Bruce v. Cook, 34 O App 563, 171 NE 424; McCombs v. Landes, 35 O App 164, 171 NE 862; Weaver v. Mt. Vernon, 36 O App 358, 173 NE 249; Dayton Biscuit Co. v. Aerni, 40 O App 49, 177 NE 775, 34 OLR 346, 10 OL Abs 344, settled and dismd May 13, 1931; Armour & Co. v. Yoter, 40 O App 225, 178 NE 596, 35 OLR 355, 11 OL Abs 186, mco Dec. 23, 1931; Graham & Wagner v. Ridge, 41 O App 288, 179 NE 693, 11 OL Abs 518; Steele v. Rail & River Coal Co. 42 O App 228, 182 NE 552, 12 OL Abs 424; Allen v. Leavick, 43 O

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App 100, 182 NE 139, 12 OL Abs 381; Barkac v. Russell, 44 O App 87, 184 NE 400, 13 OL Abs 290; Ohio Exch. for Educational Films Co. v. P. & R. Amusement Co. 45 O App 10, 186 NE 746, 38 OLR 270, 13 OL Abs 510, mco March 8, 1933; Woodward v. Gray, 46 O App 177, 188 NE 304, 39 OLR 314, 16 OL Abs 138, mco Oct. 11, 1933; Witham v. Kroger Grocery & Baking Co. 51 O App 499, 1 NE2d 949, 3 O Ops 387, 20 OL Abs 382; Fineberg v. Lincoln-Phelps Apartment Co. 55 O App 402, 9 NE2d 1011, 9 O Ops 107, 19 OL Abs 81; Rickabaugh v. Youngstown Municipal R. Co. (1936) 55 O App 431, 9 NE2d 900, 9 O Ops 129, 23 OL Abs 544, mco Jan. 20, 1937; Norris v. Mingo Junction (1937) 55 O App 288, 9 NE2d 742, 9 O Ops 66, 24 OL Abs 272; Gaus v. Pennsylvania R. Co. (1937) 56 O App 299, 10 NE2d 635, 9 O Ops 389, 25 OL Abs 24; Fries v. Cincinnati Street R. Co. (1941; App) 35 NE2d 770, 33 OL Abs 654, affd 138 OS 537, 37 NE2d 193, 21 O Ops 420; Karle v. Cincinnati Street R. Co. (1942) 69 O App 327, 43NE2d 762, 24 O Ops 102, 37 OL Abs 164; Furnis v. Industrial Commission (1942) 71 O App 146, 45 NE2d 782, 25 O Ops 507, 37 OL Abs 125, mco Dec. 9, 1942; Coldren v. May (1942) 72 O App 484, 52 NE2d 528, 27 O Ops 425, 39 OL Abs 182; Edwards v. Benedict (1946) 79 O App 134, 60 NE2d 471, 34 O Ops 494, 47 OL Abs 473; Moody v. Vickers (1947) 79 O App 218, 72 NE2d 280, 34 O Ops 544, 48 OL Abs 353; Rinkes v. Tyler (1949) 86 O App 8, 89 NE2d 694, 40 O Ops 450; bolser v. Smalley (1951) 89 O App 161, 101 NE2d 147, 45 O Ops 426; Lavell v. Raskin Hotel Co. (1951) 90 O App 185, 102 NE2d 611, 47 O Ops 145, 60 OL Abs 258; Dull v. American Teleph. & Teleg. Co. (App) 1 OL Abs 750; Laschiacza v. Bloomington (App) 2 OL Abs 12; St. Louis, T. & E. R. Co. v. Cincinnati, N.O. & T. P.R. Co. (App) 5 OL Abs 501; Reed v. Boone (App) 6 OL Abs 21; Cuyahoga Baking Co. v. Thomasouska (App) 6 OL Abs 195; Chima v. Galusca (App) 6 OL Abs 276; Van Canfort Co. v. Morris (App) 6 OL Abs 507; Doran v. Hempey (App) 6 OL Abs 622; Counts v. Wortman (App) 8 OL Abs 478; Nicastro v. Youngstown Municipal R. Co. (App) 9 OL Abs 244; Pohl v. McAfee (App) 10 OL Abs 555; Biechler v. Jewett (App) 11 OL Abs 245; Hawes v. William (App) 12 OL Abs 98; Poppas v. New Boston (App) 12 OL Abs 234; Tailford v. Herold (App) 12 OL Abs 470; Hoffman v. Pittsburg & L. E. R. Co. (App) 13 OL Abs 153; Baumeister v. Nevin Bus Lines (App) 13 OL Abs 224; Thompson v. Goodyear Tire & Rubber Co. (App) 13 OL Abs 615, mco April 5, 1933; Fincher v. Summit Beach Park Co. (App) 13 OL Abs 665; Pompano Realty Co. v. Whitefort (App) 14 OL Abs 361; Chambers v. Holtcamp (App) 14 OL

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Abs 413; Jones v. Coombs (App) 19 OL Abs 27; Schmidt v. Kinney (App) 19 OL Abs 269; Singleton v. Polster (App) 19 OLAbs 531; Monnett v. Producers Co-op. Commission Asso. (App) 19 OL Abs 581; Accordino v. McKay (App) 22 OL Abs 93; Hines v. Office (1936; App) 21 OL Abs 553; Haughn v. Detroit, T. & I. R. Co. (1937; App) 25 OL Abs 123, mco Dec. 22, 1937; Parker v. Cincinnati (1937; App) 25 OL Abs 359, mco Nov. 24, 1937; Fitzgerald v. Umbaugh (1937; App) 26 OL Abs 405; Wolfel v. Union County (1938; App) 27 OL Abs 87; Price v. Times-Press Co. (1938; App) 28 OL Abs 501; McKay v. McKay Tire Stores (1938; App) 29 OL Abs 304; Crawford v. Tarvin (1939; App) 29 OL Abs 697; Roeckers v. Lawrence (1939; App) 30 OL Abs 127; Harper v. McQuown (1939; App) 30 OL Abs 389; Kozlowski v. Cleveland R. Co. (App) 27 OLR 254; Mergenthaler v. Dorman (App) 36 OLR 241, 11 OL Abs 198; McAllister v. Bright (App) 36 OLR 460, 12 OL Abs 129 (holding that the two issue rule applied where issues of negligence and agency of the driver of an automobile were not commingled and overlapping, but were distinct and separable); Mossholder v. Head (App) 37 OLR 372, 13 OL Abs 421; Weaver v. Liberty Cabs (1936; App) 33 NE2d 853, 7 O Ops 123, 21 OL Abs 563; Sharpsteen v. Cincinnati Street R. Co. (1938; App) 31 NE2d 885, 12 O Ops 287, 27 OL Abs 202; Sprung v. E. I. DuPont de Nemours & Co. (1939; App) 34 NE2d 41, 16 O Ops 364, 30 OL Abs 278 (opinion on rehearing), dismd for want of debat q 136 OS 94, 23 NE2d 947, 16 O Ops 368; Titus v. Stouffer (1941; App) 40 NE2d 178, 35 OL Abs 145, mco Dec. 31, 1941; Chevalley v. Degar (1943; App) 52 NE2d 544, 39 OL Abs 301; Berger v. Grandview Bldg. Co. (1944; App) 59 NE2d 759, 42 Ol Abs 99; Acme Meter Serv. Corp. v. Olentangy Village Housing Corp. (1944; App) 68 NE2d 389, 45 OL Abs 636; American Nat. F. Ins. Co. v. Western Ohio Pub. Serv. Co. (1947; App) 75 NE2d 72, 48 OL Abs 457; Bachman v. Ambos (1947; App) 79 NE2d 177, 50 OL Abs 97.

A general verdict for the defendant in an action on a demand note in which there was a general issue as to the plaintiff's character as a holder in due course, and also the special one as to whether the note was negotiated an unreasonable time after its demand, cannot be disburbed by the reviewing court if one of such issues was tried without error. Daugherty v. W. W. Wilson & Son (App) 14 OL Abs 655, mco Nov. 29, 1933.

When the general verdict and special findings of the jury can be reconciled upon one decisive issue, the general verdict must be sustained

rule and is a rule of policy[20] designed to simplify the work of

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even though there may be error in the findings on other issues. Neill v. Franklin County (App) 1 OL Abs 800.

If a general verdict in favor of the plaintiff is sustained by a special finding which is supported by evidence upon one cause of action, it is immaterial whether the trial court erred in overruling a demurrer to another cause of action. Snyder v. Schardt, 9 OCC NS 615, 29 OCC 714.

Claimed errors relating solely to issues other than defendant's negligence will not justify reversal of a judgment rendered on a general verdict for the defendant where: (a) the jury's verdict should be for the defendant if defendant was not negligent, (b) the issue of the defendant's negligence was properly submitted to the jury, (c) the plaintiff did not request the court to submit any interrogatories to the jury, and (d) the answers of the jury to interrogatories submitted at the defendant's request and without objection of the plaintiff are consistent with the finding that the defendant was not negligent. Soltz v. Colony Recreation Center (1949) 151 OS 503, 87NE2d 167, 39 O Ops 322.

[20]Knisely v. Community Traction Co. 125 OS 131, 180 NE 654; Bush v. Harvey Transfer Co. (1946) 146 OS 657, 67 NE2d 851, 33 O Ops 154; Red Star Yeast & Products Co. v. Engel (App) 21 OL Abs 537 ("the rule is not one of error, but of policy"); Jones v. Armour & Co. (1937; App) 24 OL Abs 129.

"This rule has prevailed for approximately sixty years in all the courts of review of this state, and, while it has not met with universal favor, it has nevertheless been a settled rule, and in proper cases universally applied." H. E. Culbertson Co. v. Warden, 123 OS 297, 175 NE 205.

A verdict of the jury in a negligence case will be affirmed under the two-issue rule, where it may have been reached upon one of two theories, one of which was claimed erroneous, the other not, and the latter theory was not illogical, where the verdict was not searched by interrogatories. Lacey v. Heisey (1936) 53 O App 451, 5 NE2d 699, 7 O Ops 284, 22 OL Abs 594, mco Oct. 14, 1936.

A judgment for defendant will be affirmed by application of the two-issue rule where, in an action by an insurance company, subrogee of the insured, against the bailee from whom an automobile was alleged stolen, the trial court, although it announced an unsound rule at law, found that the plaintiff failed to prove that the car of the insured was in the garage

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trial courts and to limit the range of proceedings on review.[1]

The basis of the general "two-issue" rule is, of course, the presumption in favor of the validity of the judgment and the duty of the party seeking to overthrow it to show affirmatively that error has occurred to his prejudice.[2] If at first thought it

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when stolen and that defendant was negligent, but found nothing relative to the contract of bailment, or as to whether the car was taken from the garage on the day it was stolen by anyone authorized to take it, since as to these vital facts, the reviewing court must assume that the trial court found for the defendant, and so doing, upon the whole record, it cannot be said that the trial court erred in maing the finding it did. North River Ins. Co. v. Ohmer (1939) 63 O App 346, 26 NE2d 767, 17 O Ops 97, 30 OL Abs 53.

[1]Kinsely v. Community traction Co. 125 OS 131, 180 NE 654; Crawford v. Tarvin (1939; App) 29 OL Abs 597.

[2]American Nat. F. Ins. Co. v. Western Ohio Pub. Serv. Co. (1947; App) 75 NE2d 72, 48 OL Abs 457.

Where the verdict of a jury may be supported upon one issue and no finding of facts was returned through which a reviewing court may be advised as to which issue the jury based its verdict upon it will be presumed that the jury made its finding upon the issue wherein no errors affirmatively appear. Sidney Dairy Products v. Boyer (1938; App) 28 OL Abs 135.

In an action by a real-estate broker for commissions, the judgment rendered for the defendant will not be disturbed where a general verdict was returned for the defendant, no request for a special verdict was made, no interrogatories were submitted, and it is not disclosed upon which defenses, the general denial or affirmative defense of release, the verdict was based, and if any presumption is to be indulged, it would be that the verdict is not based upon a defense which was not supported by any evidence whatever. Esselburn v. Adams (1939; App) 34 OL Abs 532.

In State v. Figuli (1938; App) 36 NE2d 19, 13 O Ops 363, 28 OL Abs 214, dismd for want of debat q 134 OS 495, 17 NE2d 920, 13 O Ops 376, wherein a conviction for murder in the first degree was sustained, the court, holding that if the evidence relating to one count of the indictment is adequately supported the verdict must stand even though the evidence as to the other count cannot be sufficient to support a verdict of first-degree murder or any included crime, said in the opinion: "It may

may seem that injustice might result from its enforcement under some circumstances, it is to be remembered that the remedy is always in the hands of counsel, since he may, in any such case, if he deems it advisable, request a special verdict upon any or all of the issues presented in the case,[3] or may submit interrogatories to be answered if the jury returns a general verdict by which the basis of such verdict will be disclosed.[4] In this connection it may be said that the courts construe a "finding of the issues joined in the cause" in favor of one of the parties as a finding in his favor of all the issues.[5]

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be contended that under a general verdict such as was returned in the instant case it is impossible to ascertain whether or not the jury intended to return verdicts of guilty as to both counts or if only one, which one. Under the situation in the instant case we have presented the well-recognized two-issue rule. If a verdict is responsive to an issue of the case upon which no error presents itself, such verdict will not be set aside because of manifest prejudicial error as it relates to other issue or issues. This rule is founded upon the principle that prejudicial error must affirmatively appear, and unless the losing party has preserved his record soas to show the manifest error every presumption will be indulged to sustain the verdict."

[3]American Nat. F. Ins. Co. v. Western Ohio Pub. Serv. Co. (1947; App) 75 NE2d 72, 48 OL Abs 457.
See RC §2315.15 (GC §11420-16).

[4]American Nat. F. Ins. Co. v. Western Ohio Pub. Serv. Co. supra.
See RC §2315.16 (GC §11420Z-17).

[5]Sites v. Haverstick, 23 OS 626; Tod v. Wick Bros. 36 OS 370.
Courts have occasionally refused to apply the two-issue rule where the jury verdict recites that the jury "found in favor of the defendant," not that it found for the defendant "on the issues joined." See Cleveland R. Co. v. Masterson, 126 OS 42, 183 NE 873, 92 ALR 15; Bowman v. Delaney, 46 O App 109, 187 NE 788, 14 OL Abs 337.
But in Kihlken v. Barber, 129 OS 485, 196 NE 164, 2 O Ops 483, it was pointed out that what was said in the Masterson Case, supra, in this respect was dicta, and that the decision denying application of the two-issue rule turned on other grounds; and in the Kihlken Case, the court held that the two-issue rule applied, even though the verdict did not contain the phrase "on the issues joined."

Situations calling for the application of this rule arise most frequently where two or more defenses are interposed in an answer, the establishment of any one of which would require or justify a judgment for the defendant. The statement of the rule in many of the cases goes no further than is necessary to cover such a situation, and it has been contended, and occasionally stated, that it should not be extended to cases in which the judgment was in favor of the plaintiff.[6] This position finds some support in an old decision by the Supreme Court to the effect that "where a verdict for the plaintiff may have been rendered upon either of two causes of action, but it does not appear upon which, a refusal to give a proper instruction on behalf of the defendant, as to either cause of action, will entitle him to a new trial,"[7] but other cases, including both early and late intermediate court decisions, have concluded from the statement of the rule and the reasoning underlying it, that there seems to be no reason why it should not be applied to uphold . verdict in favor of a plaintiff in a proper case, notwithstanding that it has commonly and usually been applied to uphold a verdict in favor of a defendant.[8]

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[6]Red Star Yeast & Products Co. v. Engel (App) 21 OL Abs 537.

The two-Issue rule is not applicable in a negligence case where the verdict is for the plaintiff. Cincinnati Street R. Co. v. Keehan, 45 O App 75, 186 NE 812, 14 OL Abs 374.

[7]Pennsylvania Co. v. Miller, 35 OS 541, 35 Am Rep 620, overruled on another point in Toledo & O. C. R. Co. v. Bowler & B. Co. 63 OS 274, 287, 58 NE 813.

[8]Zimmerman v. Second Nat. Bank, 24 O App 48, 157 NE 157, mco Schaaf v. Second Nat. Bank, 25 OLR 97; McKay v. McKay Tire Stores (1938; App) 29 OL Abs 304; Berger v. Grandview Bldg. Co. (1944; App) 59 NE2d 759, 42 OL Abs 99 (where the court held that there was no good reason why the two-issue rule should be stricted to benefit defendants only, and held that it could be applied to uphold a verdict in favor of a plaintiff; this conclusion was reached notwithstanding

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The late Ohio cases have settled the point that the "two-issue" rule is applicable where the only separate issues are those of negligence and contributory negligence,[9] provided

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Pennsylvania Co. v. Miller, 35 OS 541, 35 AM Rep 620, supra, which the court characterized as "disturbing," and pointed out that it had not been "directly overruled" on this point); Cleveland City R. Co. v. Powell, 22 OCC NS 305, 43 OCC 581. See also A. F. Waite Taxi & Livery Co. V. McGrew, 16 O App 219, in which the rule was applied to sutain a verdict for the plaintiff.

The two-issue rule applies in an action to set aside a will on the ground of mental incapacity and undue influence, where the verdict was for plaintiff and no interrogatories were submitted to the jury. Olney v. Schurr (1936; App) 21 OL Abs 630, dismd for want of debat q 131 OS 398, 3 NE2d 43, 6 O Ops 98.

[9]Knisely v. Community Traction Co. 125 OS 131, 180 NE 654 (leading Supreme Court decision laying down principle stated); Binder v. Youngstown Municipal R. Co. 125 OS 193, 180 NE 899; Kihlken v. Barber, 129 OS 485, 196 NE 164, 2 O Ops 483; Swoboda v. Brown, 129 OS 512, 196 NE 274, 2 O Ops 516 (recognizing general principle, but holding two-issue rule inapplicable to save the general verdict in the instant case); Youngstown Municipal R. Co. v. Mikula (1936) 131 OS 17, 1 NE2d 135, 5 O Ops 288; Leonardi v. A. Habermann Provision Co. (1944) 143 OS 623, 56 NE2d 232, 28 O Ops 511; Bush v. Harvey Transfer Co. (1946) 146 OS 657, 67 NE2d 851, 33 O Ops 154; Matis v. Woodruff, 31 O App 73, 166 NE 203, 6 OL Abs 118, mco March 28, 1928; Woodward v. Gray, 46 O App 177, 188 NE 304, 39 OLR 314, 16 OL Abs 138, mco Oct. 11, 1933; Fineberg v. Lincoln-Phelps Apartment co. 55 O App 402, 9 NE2d 1011, 9 O Ops 107, 19 OL Abs 81; Norris v. Mingo Junction (1937) 55 O App 288, 9 NE2d 742, 9 O Ops 66, 24 OL Abs 272; Gaus v. Pennsylvania R. Co. (1937) 56 O App 299, 10 NE2d 635, 9 O Ops 389, 25 OL Abs 24; Lavell v. Raskin Hotel Co. (1951) 90 O App 185, 102 NE2d 611, 47 O Ops 145, 60 OL Abs 258; Poppas v. New Boston (App) 12 OL Abs 234; Tailford v. Herold (App) 12 OL Abs 470; Thompson v. Goodyear Tire & Rubber Co. (App) 13 OL Abs 615, mco April 5, 1933; Fincher v. Summit Beach Park Co. (App) 13 OL Abs 665; Singleton v. Polster (App) 19 OL Abs 531; Accordino v. McKay (App) 22 OL Abs 93; Haughn v. Detroit, T. & I. R. Co. (1937; App), 25 OL Abs 123, mco Dec. 22, 1937; Parker v.

that the issue of negligence was correctly submitted.[10]

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Cincinnati (1937; App) 25 OL Abs 359, mco Nov. 24, 1937; Fitzgerald v. Umbaugh (1937; App) 26 OL Abs 405; Price v. Times-Press Co. (1938; App) 28 OL Abs 501; Crawford v. Tarvin (1939; App) 29 OL Abs 697; Harper v. McQuown (1939; App) 30 OL Abs 389; Sharpsteen v. Cincinnati Street R. Co. (1938; App) 31 NE2d 885, 12 O Ops 287, 27 OL Abs 202; Fries v. Cincinnati Street R. Co. (1941; App) 35 NE2d 770, 33 OL Abs 654, affd 138 OS 537, 37 NE2d 193, 21 O Ops 420; Chevalley v. Degar (1943; App) 52 NE2d 544, 39 OL Abs 301.

The two-issue rule applies where negligence and contributory negligence are submitted to the jury, a general verdict for the defendant is returned, no claim is made that the issue of negligence was not submitted properly and without error, and no interrogatories are submitted. Fries v. Cincinnati Street R. Co. (1941; App) 35 NE2d 770, 33 OL Abs 654, affd 138 OS 537, 37 NE2d 193, 21 O Ops 420.

The rule is well settled that where a case presents issues of both negligence and contributory negligence, and error intervenes in only one of these, a verdict for the defendant will not be disturbed. Woodward v. Gray, 46 O App 177, 188 NE 304, 16 OL Abs 138, mco Oct. 11, 1983.

Where an action is brought for wrongful death on account of the alleged negligence of the defendant and the question of contributory negligence arises from the evidence, although not plead as a defense, there are two separate and distinct issues to which the so-called two-issue rule has full application. Crawford v. Tarvin (1939; App) 29 OL Abs 697.

[10]Bush v. Harvey Transfer Co. (1946) 146 OS 657, 67 NE2d 851, 33 O Ops 154 (where the court said in the opinion that in no instance in Supreme Court decisions had the two-issue rule ever been applied where prejudicial and reversible error occurred in the submission of the issue of negligence and not in the issue of contributory negligence); American Nat. F. Ins. Co. v. Western Ohio Pub. Serv. Co. (1947; App) 75 NE2d 72 48 OL Abs 457.

The Supreme Court decision in the Bush Case, supra, renders inoperative previous decisions of lower courts which had held that the two-issue rule would save a general verdict for the defendant, provided that the issue of contributory negligence was properly submitted, notwithstanding that there may have been error in submission of the issue of negligence. Among the decisions which may no longer be safely considered as authoritative, see Rickabaugh v. Youngstown Municiipal

Some of the recent Ohio cases have indicated a disinclination to extend the operation of the "two-issue rule.[11] Of course it cannot be applied where the circumstances are such that the general verdict could not be a finding for the successful party on all the issues,[12] where the error affects the entire matter to be submitted to the jury,[13] or relates to or might have

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R. Co. (1936) 55 O App 431, 9 NE2d 900, 9 O Ops 129, 23 OL Abs 544, mco Jan. 20, 1937; Karle v. Cincinnati Street R. Co. (1942) 69 O App 327, 43 NE2d 762, 24 O Ops 102, 37 OL Abs 164; Hoffman v. Pittsburg & L.E.R. Co. (App) 13 OL Abs 153; Jones v. Coombs (App) 19 OL Abs 27; Hines v. Office (1936; App) 21 OL Abs 553; Wolfel v. Union County (1938; App) 27 OL Abs 87; Roeckers v. Lawrence (1939; App) 30 OL Abs 127; Weaver v. Liberty Cabs (1936; App) 33 NE2d 853, 7 O Ops 123, 21 OL Abs 563.

[11]H.E. Culbertson Co. v. Warden, 123 OS 297, 175 NE 205; Swoboda v. Brown, 129 OS 512, 196 NE 274, 2 O Ops 516 (holding that there is no inclination to extend further the application of the two-issue rule, and that if prejudicial error is committed in the submission of an issue which it clearly appears, by answer to an interrogatory submitted upon request of defendant, was decided by the jury against the plaintiff, the verdict will not be sustained, although it is possible the finding upon some other issue submitted without error may also have been against the plaintiff); Bush v. Harvey Transfer Co. (1946) 146 OS 657, 67 NE2d 851, 33 O Ops 154; Red Star Yeast & Products Co. v. Engel (App) 21 OL Abs 537; Kushlan v. P. & O. Coach Lines (App) 33 OLR 642, 9 OL Abs 78.

See Readnour v. Cincinnati Street R. Co. (1950) 154 OS 69, 93 NE2d 587, 42 O Ops 145, approving and following H. E. Culbertson Co. v. Warden, 123 OS 297, 175 NE 205, supra.

[12]Masters v. Cincinnati Traction Co. 16 O App 99, mco 2 OLR 136.

[13]Gross v. Ohio sav. & T. Co. 116 OS 230, 156 NE 205; Cowley v. Bolander, 120 OS 553, 166 NE 677; Acrey v. Bauman (1938) 134 OS 449, 17 NE2d 755, 13 O Ops 39 (holding that the two-issue rule does not apply where testimony is admitted as to one issue, which has the natural tendency of engendering racial prejudice against the losing party as to all issues, and the presumption will be indulged that such testimony influenced the general verdict of the jury, requiring reversal of a judgment based thereon); Bush v. Harvey Transfer Co. (1946) 146 OS 657, 67 NE2d 851, 33 O Ops 154; Westropp v. E. W. Scripps Co. (1947) 148 OS 365, 74 NE2d 340, 35 O Ops 341.

influenced the determination of all the issues in the case,[14] where there are various errors some of which relate to one issue and some to the other so that no issue was tried without error,[15] or where there is in fact only a single issue.[16]

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[14]Scioto Valley R. & Power Co. v. Rutter, 112 OS 500, 147 NE 910; Tresise v. Ashdown, 118 OS 307, 160 NE 898, 58 ALR 1476; Cowley v. Bolander, 120 OS 553, 166 NE 677; Cleveland R. Co. v. Masterson, 126 OS 42, 183 NE 873, 92 ALR 15; Acrey v. Bauman, 134 OS 449, 17 NE2d 755, 13 O Ops 39; Westropp v. E. W. Scripps Co. (1947) 148 OS 365, 74 NE2d 340, 35 O Ops 341; Masters v. Cincinnati Traction Co. 16 O App 99, mco 20 OLR 136 and 22 OLR 6; Palm v. Community Traction Co. 32 O App 89, 167 NE 604; Sharp v. Russell, 37 O App 306, 174 NE 617, 9 OL Abs 445, mco Feb. 11, 1931 (holding that where prejudicial error intervenes in submission of one or more issues joined, and the verdict is general, the judgment must be reversed when there can be no finding in favor of the defendant logically arrived at on all the other issues in the case); Petrey v. Liuzzi (1945) 76 O App 19, 61 NE2d 158, 31 O Ops 347, 43 OL Abs 337; Kinney v. Schmidt (App) 13 OL Abs 582 (erroneous instruction as to burden of proof which could apply to both issues in case); Helvie v. Ratta (App) 14 OL Abs 40; Thomas v. Heer (App) 17 OL Abs 201.

The two-issue rule has no application where improper and prejudicial cross-examination and argument to the jury based thereon are such as to engender passion and prejudice against the losing party and adversely affect him as to all the issues in the case and influence the general verdict of the jury. Plas v. Holmes Constr. Co. (1952) 157 OS 95, 104 NE2d 689, 47 O Ops 86, approving and following Acrey v. Bauman (1938) 134 OS 449, 17 NE2d 755, 13 O Ops 39.

[15]Gallup v. Toledo Terminal R. Co. 26 O App 447, 160 NE 493; Mccombs v. Landes, 35 O App 164; 171 NE 862; Mulcahy v. Deitrick, 39 O App 65, 176 NE 481 (action for alleged slander of plaintiff in his occupation as a school teacher); Hamilton v. Gilkey (1937) 56 O App 438, 10 NE2d 1014, 9 O Ops 458, 25 OL Abs 164, mco June 16, 1937.

The two-issue rule does not apply whether neither of the two issues of negligence and contributory negligence is submitted free of error. Hamilton v. Gilkey, supra.

Although an error in a charge reflects only upon the issue of plaintiff's contributory negligence, the multiple issue rule does not apply to a case to prevent reversal and remand for a new trial where, upon the issue of the

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negligence of defendant, the jury verdict is found to be against the manifest weight of the evidence. Ransom v. Feeney (1947) 81 O App 7, 76 NE2d 908, 36 O Ops 334.

[16]H. E. Culbertson Co. v. Warden, 123 OS 297, 175 NE 205; Gottesman v. Cleveland (1944) 142 OS 410, 52 NE2d 644, 27 O Ops 353 (holding that the two-issue rule does not apply in an action for wrongful death of a child between the ages of four and five years, grounded on nuisance, in which the answer in effect pleads a general denial and sole negligence of the decedent, since there actually is only one issue which can be presented to the jury); Taylor v. Cincinnati (1944) 143 OS 426, 55 NE2d 724, 155 ALR 44, 28 O Ops 369 (holding that a claim by a defendant that plaintiff's injuries were incurred when an automobile in which he was a passenger collided with an elm tree located a few inches outside the paved portion of a road and were proximately caused solely by the negligent acts of a third person, the driver of the automobile, is only another form of a general denial, does not create a separate issue, and does not furnish any basis for application of the two-issue rule); Jasionowski v. Industrial Commission, 25 O App 319, 158 NE 195, mco 25 OLR 175; Bowman v. Delaney, 46 O App 109, 187 NE 788, 14 OL Abs 337; Petrey v. Kiuzzi (1945) 76 O App 19, 61 NE2d 158, 31 O Ops 347, 43 OL Abs 337; Cox v. Waltz (App) 13 OL Abs 364 (verdict for plaintiff based upon the one issue that the negligence of the defendant was the sole proximate cause of the accident); Friedman v. Labos (1936; App) 23 OL Abs 217; Marchal v. Frankman (1943; App) 58 NE2d 679, 41 OL Abs 336. See Augusta v. paradis (1939) 61 O App 323, 22 NE2d 578, 15 O Ops 218, mco April 26, 1939.

"The rule declared in Sites v. Haverstick, 23 OS 626, has no application to specifications of negligence, separately stated and numbered, but which in fact constitute a single negligent act resulting in a single loss and damage." H. E. Culbertson Co. v. Warden, 123 OS 297, 175 NE 205; Gutterman v. Bohm (App) 20 OL Abs 69, mco Dec. 26, 1935; Behrens v. Warrick (1940; App) 32 OL Abs 437. To the same effect, see Readnour v. Cincinnati Street R. Co. (1950) 154 OS 69, 93 NE2d 587, 42 O Ops 145, affg 87 O App 85, 93 NE2d 412, 42 O Ops 311, 57 OL Abs 43; Klever v. Reid Bros. Express, Inc. (1951) 154 OS 491, 96 NE2d 781, 43 O Ops 429.

The two-issue rule is not applicable to different elements or items of damage resulting from a single tortious act. Stemper v. Campbell (1951) 155 OS 1, 97 NE2d 25, 44 O Ops 24.

The Ohio "two-issue" rule will not be applied in a case arising in the federal courts of Ohio, because it impinges on the Federal Rules of Civil Procedure, Rule 49 (a) and (9).[17] It has been held, however, to apply in an action in a state court to enforce a liability arising under a federal statute even though contrary to the rule followed by the federal courts.[18]

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The question of punitive damages in a breach of promise action is not a separate issue justifying application of the two-issue rule. Friedman v. Labos (1936; App) 23 OL Abs 217.

The two-issue rule applies only where one issue has been properly submitted, and not where there exist errors in the charge of the court on the question of compensatory damages, as well as punitive damages, in a breach of promise action. Friedman v. Labos, supra.

The two-issue rule does not apply to a general denial constituting one defense only, although it permitted proof that some other person was the guilty party. Gutterman v. Bohm (App) 20 OL Abs 69, mco Dec. 26, 1935.

In Cleveland R. Co. v. Kozlowski, 128 OS 445, 191 NE 787, the court stated in the opinion, per Stephenson. J.: "An admission of liability in a personal injury case sends the pleadings to the four winds, except as to the nature and scope of the injuries, on the one side, and the denial thereof, on the other. Negligence and proximate cause go out of the case as if by magic, and nothing remains for the jury to do except to fix the amount of damage. This is the sole and only issue left in the case. In the face of the admission of liability in this case the 'two-issue rule,' as announced in Sites v. Haverstick, 23 OS 626, is not involved."

The two-issue rule will not be applied to sustain a judgment for plaintiff where the issues contended for are not clearly independent. Red Star Yeast & Products Co. v. Engel (App) 21 OL Abs 537.

[17]Williams v. Powers (1943; CCA 6th Ohio) 135 F2d 153, 26 O Ops 359 (where the court pointed out that the power to prescribe the practice, pleadings, forms, and modes of proceeding in the courts of the United States is lodged in Congress and cannot be abrogated or diminished by the states without the consent of the lawmaking power of the central government, and that Congress has the right to delegate to the Supreme Court and other federal courts authority to make rules not inconsistent with the statutes or Constitution of the United States governing the rules of practice and procedure in the federal courts).

[18]Jones v. Erie R. Co. 106 OS 408, 140 NE 366.

NO. 79-201

IN THE SUPREME COURT OF OHIO

Appeal From the Court of Appeals
of Richland County, Ohio
Fifth District

DAVID E. PISEL, et al.,
Plaintiff-Appellee

vs.

ITT CONTINENTAL BAKING COMPANY, et al.,
Defendants-Appellants

MOTION FOR RECONSIDERATION AND REQUEST FOR ORAL HEARING

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No. 79-201

IN THE SUPREME COURT OF OHIO

DAVID E. PISEL, et al., Plaintiff-Appellee	)
vs.	) Appeal From The Court of Appeals of Richland County,
ITT CONTINENTAL BAKING COMPANY, et al., Defendants-Appellants	) Ohio, Fifth District

MOTION FOR RECONSIDERATION AND REQUEST FOR ORAL HEARING

Now comes the plaintiff-appellee by his attorney, Alfred J. Tolaro, and respectfully moves this Honorable Court to reconsider its reversal of the judgment of the Court of Appeals and entering final judgment for the appellant for the reasons set forth in the attached Brief.

ZIDAR, MORGAN and TOLARO

By /s/ Alfred J. Tolaro
ALFRED J. TOLARO
Attorney for Plaintiff-Appellee

BRIEF

The per curiam decision of this learned court in this case is so patently deficient and incomplete that it constitutes a gross denial of the plaintiff's constitutional right to due process and equal protection of law and runs contra to a principle of Ohio law that has been followed in this state for over one hundred years.

By virtue of the per curiam decision in this case, this ordinarily judicious and learned court has completely abrogated and nullified a rule of law so firmly entrenched in our appellate system as to give every lawyer and student of the law confusion and frustration as to the meaning of the TWO ISSUE RULE.

Shockingly and suprisingly this court in the per curiam opinion states that this case involves, "The question of whether Brubaker's (hereinafter "appellant") behavior amounted to *wanton* misconduct."

It is with great humility, but yet with professional obligation that I suggest to this court that the "per curriam" has completely and absolutely failed to consider the correct issue presented to them in this case.

The question is not whether the appellant's behavior amounted to *wanton* misconduct, but rather whether his behavior amount to *wilful* or *wanton* misconduct and whether the TWO ISSUE RULE is applicable in this case.

It is a legal impossibility for this court to make a final ruling in this case without first considering the TWO ISSUE RULE in respect to the second issue of *wilful* misconduct.

The TWO ISSUE RULE was first adopted by the Supreme Court in *Sites v. Haverstick,* 23 O.S. 626 and was followed consistently by the Ohio Supreme Court in some twenty-four (24) reported decisions, most recently in *Centrello v. Basky,* 164 O.S. 41, wherein the Court held in Syllabus 4 as follows:

> "Where a general verdict is returned for one of the parties, and the mental processes of the jury are not tested by special interrogatories to indicate which issue was determinative of the verdict, it will be presumed that all issues were resolved in favor of the prevailing party, and where a single determinative issue has been presented free from error, error in presenting another issue will be disregarded."

The plethora of Supreme Court and Appellate Court decisions supporting the TWO ISSUE RULE in Ohio are too numerous to cite in this brief.

The Supreme Court has acknowledged the importance of the TWO ISSUE RULE by the adoption of Ohio Civil Rule 49 wherein provision is made for testing the verdict by special interrogatories.

Under the law of *Wilful Misconduct,* a defendant cannot escape liability if all other elements of the tort are present upon establishing that "some" was used by the defendant to avoid injury. The Supreme Court defined Wilful Misconduct in *Tighe v. Diamond* 149 O.S. 520 at page 527 as follows:

> " 'Wilful Misconduct' implies an intentional deviation from a clear duty or from a definite rule of conduct, a deliberate purpose not to discharge some duty necessary to safety, or purposely doing wrongful acts with negligence or appreciation of the likelihood of resulting injury. . . . ."

The Court further noted at page 527 as follows:

> " 'Wilful Misconduct' on the part of a motorist, within the contemplation of the Guest Statutes similar to the Ohio Guest Statute, is either the doing of an act with specific intent to injure his passenger, or, with full knowledge of existing conditions, the intentional execution of a wrongful course of conduct which he knows should not be carried or the intentional failure to do something which he knows should be done in

connection with his operation of the automobile, under circumstances tending to disclose that the motorist knows or should know that an injury to his guest will be the probable result of such conduct."

The Supreme Court clearly established "wilful Misconduct" and wanton misconduct as separate and distinct torts in Syllabus 1 and 2 of *Bailey v. Brown,* 34 O.S.2d. 62, as follows:

1. "Wilful misconduct," as used in the Ohio guest statute (R.C. 4515.02), implies an intention or purpose to do wrong, an intentional deviation from a clear duty or from a definite rule of conduct, and not a mere error of judgment. (Paragraph three of the syllabus in *Tighe v. Diamond,* 149 Ohio St.520, approved and followed.)
2. "Wanton misconduct" is such conduct as manifests a disposition to perversity, and it must be under such surrounding circumstances and existing conditions that the party doing the act or failing to act must be, etc.

The TWO ISSUE RULE is so firmly entrenched and established in the law of Appellate Review in Ohio that it can be categorized as irrefutable authority binding the Appellate Courts system. It is well settled that where the jury returns a general verdict in a case involving two or more issues, the finding upon any one of which in favor of the successful party would entitle him to judgment, "If the Record does not disclose affirmatively by answers to interrogatories or otherwise upon which issues such verdict was based, the judgment will not be reversed if no error appears as to any one or more of them although there may be error as to other issues. This is known in jurisprudence as the 'Two Issue Rule'—." 4 O.Jur.2d.26 *Appellate Review* §831.

The decision of the majority in this case reversing the

judgment below for the plaintiff and entering final judgment, absent any consideration by the court whatsoever of the issue of *wilful* misconduct by the defendant, is an abrogation of the TWO ISSUE RULE in Ohio, or a denial of plaintiff's right to due process and equal protection of law.

Pisel filed his complaint against the Baking Co. alleging that he lost his leg as a result of the *wilful* and *wanton* misconduct of the defendant. (See Exhibit A). These are *two* separate issues.

The jury was charged by the trial judge on the issue of *wilful* or *wanton* misconduct of the defendant and no objection was made to the charge. (See Exhibit B).

A general verdict was rendered in favor of the plaintiff and there is no way of knowing whether it was based on defendant's *wanton* misconduct or *wilful* misconduct inasmuch as no interrogatories were submitted to the jury on that question.

The question of *wilful* or *wanton* misconduct was presented to the court of appeals in Arguments III, IV and VI (see Exhibit C), and judgment for the plaintiff was affirmed.

Then the Supreme Court allowed a motioin to certify on appellant's proposition of Law No. 1 (See Exhibit D), which involved the question of *wilful* or *wanton* misconduct, but for some reason this court considered only the question of *wanton* misconduct, and completely ignored the issue of *wilful* misconduct. What happened to the issue of *wilful* misconduct? What wasn't it considered? When did plaintiff lose the right to be upheld on the issue of *wilful* misconduct? Does the TWO ISSUE RULE no longer apply in Ohio?

Did the jury award the plaintiff his judgment on the basis of *wilful* misconduct or *wanton* misconduct? If the majority of this court feels that it wasn't *wanton* misconduct, then in all probability the judgment was rendered on the basis of *wilful*

misconduct as argued in plaintiff's Supreme Court Brief at Page 11. (See Exhibit E).

In *Hawkins v. Ivy,* 50 O.S.2d.114, there was no question raised on the issue of *wilful* misconduct because that issue was never raised in the complaint. The only issue was *wanton* misconduct. In the within case both *wilful* and *wanton* are in issue and always have been, and still are.

Thus, the basis of plaintiff's within motion is that this court's decision is incomplete and erroneous. Before a final determination can be made in this case, it must consider both the issues of *wilful* misconduct which is still before the Court in this case, as well as *wanton* misconduct, by virtue of the TWO ISSUE RULE.

It is apparently the feeling of the majority of this court that if a defendant uses "some care" then he cannot e charged with *wanton* misconduct as a matter of law. What is "some care", isn't it really a jury question?

But turning to the other issue of *wilful* misconduct, the majority of this court must also determine whether reasonable minds can differ on the question of whether the facts may constitute *wilful* misconduct. The defendant intentionally left his vehicle blocking the passing lane of a high speed highway. This is an intentional wrongful act. He didn't negligently leave the truck in that dangerous position. He did so intentionally so he would benefit from the police investigation of the accident. He further admitted that he knew the truck was in a dangerous position, so he thus could conclude that probability of harm to others would be great. He also did so knowing that he did not set out flares in the road and that his truck was not disabled. If the jury is not permitted to find the defendant guilty of *wilful* misconduct on these facts, then maybe the law of *wilful* misconduct should be eliminated in Ohio.

Justice Lynch in his dissenting opinion already agrees that the defendant was guilty of *wilful* misconduct, he stated so in his opinion (see Exhibit F). How can it now be said that reasonable minds cannot differ on whether the facts constitute *wilful* misconduct?

This honorable court granted appellant's Motion to Certify because it felt this case was of great public interest. Apparently, it is of great public interest as there were two dissenting opinions written by this court.

This case is important. It is important to the young plaintiff who lost his leg, and his family, and it is important to the motoring public of the State of Ohio.

In addition, it is important to all the lawyers of the State of Ohio who rely on the decisions of the Supreme Court for precedence and to the many law school instructors who will use it as a landmark case to help define *wanton* misconduct to new law students.

The eyes of many legal minds will scrutenize this decision for many years to come and all Ohio courts will rely on its rule of law for precedence.

It is apparently the feeling of the majority of this court that if a person creates a dangerous condition knowing there is a great probability that it will cause harm to others, that he will not be guilty of *wanton* misconduct if he uses some care regardless of how little or how effective it is. Isn't this really a question of fact for the jury?

Regardless as to how you stand on the issue of *wanton* misconduct, it is not dispositive of this case.

It is an obvious and absolute duty of this honorable court in following the law of Ohio to reach a decision and rule on the issue of *wilful* misconduct in conjunction with the TWO ISSUE RULE before making a final judgment in this case.

It is appellee's further contention that the reversal of the judgment herein for the plaintiff by the Ohio Supreme Court

in total disregard of the TWO ISSUE RULE is an unconstitutional denial of the plaintiff's right of due process and equal protection of law as guaranteed by both the Federal and State constitutions.

The Trial Court, properly and correctly, charged the jury on the issue of Wilful Misconduct. No objection was made to that charge. There is no requirement in the law of Wilful Misconduct of "failure to exercise any care whatsoever under the circumstances." Hence, the Trial Court had no right or authority to grant the defendant a directed verdict on the issue of exercising some care under the circumstances.

Article I, Section 16, of the Ohio Constitution provides that every person shall have remedy by due course of law and shall have justice administered without denial or delay.

Both the Fifth and Fourteenth Amendments of the Federal Constitution provide due process rights to the citizens of the United States whereby property cannot be taken from them without due process of law.

The plaintiff-appellee within appeared in this Court with a valuable property right, i.e. the judgment against the defendant-appellant in the sum of Two Hundred and Fifteen Thousand Dollars ($215,000.00).

We submit that plaintiff-appellee had a constitutionally protected right to have his case considered under the equivocally and firmly entrenched doctrine of law which exists in the State of Ohio, known as the TWO ISSUE RULE. This is in fact a rule of law adopted for the purpose of protecting the rights of a litigant who receives a favorable verdict in a jury trial in a situation where the verdict could have been rendered on the basis of one of two issues, where there was error by the trial court on one of such issues. It is a rule of law related to a judicial procedure whereby a litigant can determine by special interrogatories upon which of two or more issues the prevailing party in the case was success-

ful. We contend that plaintiff-appellee's constitutional right of due process of law was denied when the decision below was reversed and final judgment entered for the defendant-appellant in a manner whereby a long, consistent line of procedural decisions on the TWO ISSUE RULE were overruled.

In *Bouie v. Columbia,* 378 U.S. 347, 12 Law Ed. 2d 894, the Supreme Court held as follows:

> "A state court which overrules a consistent line of procedural decisions, with the retroactive effect of denying a litigant a hearing in a pending case, thereby deprives him of due process of law and its primary sense of an opportunity to be heard and defend his substantive right."

In conclusion, the decision of the majority in this case cannot be sustained unless the TWO ISSUE RULE has been abrogated by the Supreme Court. Not once in the decision of the majority was *wilful* misconduct mentioned, nor was the tort *wilful* misconduct briefed and argued by appellant. The decision of the majority cannot be sustained under all principles of appellate procedure in Ohio because it reviews only the law of *wanton* misconduct. Nobody knows whether the jury decided the case on that issue. No error has been established by the Court on the issue of *wilful* misconduct and until that issue is considered, there has been an absence of justice in this case.

Appellee respectfully requests an oral hearing.

Respectfully submitted,

ZINDAR, MORGAN and TOLARO

By /s/ Alfred J. Tolaro
ALFRED J. TOLARO
Attorney for Plaintiff-Appellant

EXHIBIT A
AMENDED COMPLAINT

CLAIM I

(1) After having first duly obtained leave of court to file his Amended Complaint and make New Parties Defendant, Plaintiff David E. Pisel says that on or about November 1, 1973, in the night season, he was operating his Honda motor vehicle in a westerly direction on State Route 30 in the City of Mansfield, Ohio, when suddenly and without warning, a motor truck owned by the Defendant, ITT Continental Baking Co., appeared in his path of travel, parked perpendicular to the roadway in the high speed lane of the highway.

(2) Plaintiff says further that the truck had been operated by Robert Brubaker in the course and scope of his employment with the ITT Continental Baking Co., and that it had become disabled as a result of the negligence of Defendant, Barbara Shaban, in colliding with it, and *willfully and wantonly* left the Defendants blocking the high speed passing lane of the highway without warning devices in violation of Section 4513.28 of the Ohio Revised Code and without regards of the safety and rights of others lawfully using the roadway.

(3) Plaintiff says further that at the time of the within incident, he was wearing an amber colored shield that was produced and distributed by Defendant, B & S Plastics, Inc., and sold by the Defendant Joseph A. Armstrong, and that they were negligent in failing to give warning to their ultimate consumer and user that these shields were not fit for use at night inasmuch as they cause dim objects to be less discernable and therefore created a safety hazard to the wearer.

(4) As a direct and proximate result of Defendants negligence and *wilful* and *wanton misconduct,* Plaintiff collided with the said motor truck sustaining great injury to his mind and body and great economic loss in the form of hospital and medical expenses and loss of income. It further resulted in the

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EXHIBIT B
CHARGE TO JURY

[463]

* * * * *

his liability for any injuries to the plaintiff.

Defendant Robert Brubaker will be liable only for injuries caused by *wilful* or *wanton* misconduct of the defendant Robert Brubaker.

I will define *Wilful Misconduct* for you. Wilful misconduct is intentionally doing that which is wrong or intentionally failing to do that which should be done. The circumstances must also disclose that the defendant knew or should have known that such conduct would probably cause injury to the plaintiff. Wilful misconduct implies an intentional disregard of a clear duty or of a definite rule of conduct; a purpose not to discharge such duty, or a purpose to perform wrongful acts with knowledge of the likelihood of resulting injury. It is purposeful action or purposeful failure to act as differentiated from neglect to act.

What is *Wanton Misconduct*—I will define that for you. Where a driver of a vehicle fails to exercise any care whatsoever toward those to whom he owes a duty of care, and his failure occurs under circumstances in which there is great

probability that harm will result, such failure constitutes wanton misconduct.

For there to be wanton misconduct there must be a failure to exercise any care whatsoever. It is of no

* * * * *

EXHIBIT C—Page 1
APPELLANT'S ASSIGNMENT OF ERROR IN COURT OF APPEAL

* * * * *

affirmatively shows that a trial court has been fully apprised of the correct law goveerning a material issue in dispute and that the complaining party has unsuccessfully requested the inclusion of that law in the trial court's charge to the jury, that party cannot be said to have waived his objections to the court's charge by failing to *formally* object after the charge is given.

Having determined that defendants-appellants were entitled to a directed verdict on the issue of negligence, we then turn to the issue of willful and wanton misconduct, the second branch of their motion.

III. IT IS ERROR FOR THE COURT TO REFUSE TO DIRECT A VERDICT IN FAVOR OF DEFENDANTS ON THE ISSUE OF *WILLFUL* OR *WANTON* MISCONDUCT WHERE THE EVIDENCE SHOWS THAT DEFENDANTS EXERCISED SOME CARE TOWARD THOSE TO WHOM THEY OWED A DUTY OF CARE.

The sole liability issue as presented to the jury in this case was the willful or wanton misconduct on the part of the

defendant, Robert Brubaker. One may quickly draw the conclusion that there was no hint of *willful misconduct,* which, as defined in *Bailey vs. Brown,* 34 Ohio St.2d 62 (1973), implied an intention or purpose to do wrong, an intentional deviation from a clear duty or from a definite rule of conduct, not a mere error in judgment. The record shows no hint of such an intention on the part of defendants. Therefore, the only consideration left is that of wanton misconduct and it is submitted that there wasn't any of that either.

The most recent decision on wanton misconduct, *Hawkins*

[–18–]
* * * * *

EXHIBIT C—Page 2
APPELLEE'S ASSIGNMENT OF ERROR IN COURT OF APPEALS

[–12–]
* * * * *

RESPONSE TO APPELLANT'S ARGUMENT III.

Defendant's third assignment of error involves two theories of law, *willful misconduct* and *wanton misconduct,* each of which terms have recently been redefined. Willful implies intentionally doing an act, and wanton implies failing to do an act.

In *Bailey v. Brown,* 34 OS 2 62 (1973), the court said the term *willful misconduct* implied an intention or purpose to do wrong, an intentional deviation from a clear duty or from a definite rule of conduct, not a mere error in judgment.

The defendant's leaving his truck parked sideways on the passing lane of a four (4) lane divided highway in a dark area for ten minutes without the truck even being disabled (T.74, Ex 13,14,15; T.216,368) may not be *willful misconduct* but rather a mere error in judgment.

But, the defendant had a clear duty to carry flares or fussees in his truck (R.C. §4513.27) and he knew it but didn't do so. (T.193,194), and the testimony was further that no flares, fussees or other warning devices were displayed in accordance with R.C. §4513.28 (T.322,355,75). These additional facts now constitute more than a mere error in judgment, it now becomes a question for the jury as to whether his conduct was an intentional deviation from a clear duty or from a definite rule of conduct, and whether they could imply an intention to do wrong.

For this reason, it was proper for the court to refuse to direct a verdict for the defendants on the issue of *willful or wanton misconduct.*

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EXHIBIT D
APPELLANT'S PROPOSITION OF LAW NO. 1

[4]

* * * * *

A timely appeal was prosecuted to the Fifth District Court of Appeals which affirmed. Thereafter, a Memorandum in Support of Jurisdiction, allowed as to proposition of law number one, was brought before this Court which now has before it the merits of this controversy.

ARGUMENT

PROPOSITION OF LAW NUMBER ONE:

Where evidence adduced from plaintiff and the witnesses for plaintiff established that following a motor vehicle accident a defendant did, in fact, exercise some care toward the motoring public by leaving on the delivery truck headlights, taillights and running lights, summoning the police and attempting to direct traffic past the accident site, the conduct of the defendant is neither wilful nor wanton, and the negligence of a motorcyclist plaintiff proceeding in the passing lane, overtaking traffic slowing to pass the accident scene, who minutes after the first accident strikes the delivery truck, bars his recovery.

Kormos v. Cleveland Retail Credit Men's Co., 131 Ohio St. 471 (1936)
Roszman v. Sammett, 26 Ohio St. 2d 94 (1971)
Kellerman v. J. S. Durig Co., 176 Ohio St. 320 (1964)
Bailey v. Brown, 34 Ohio St. 2d 62 (1973)
Hawkins v. Ivy, 50 Ohio St. 2d 114 (1977)
Rule 50(A)(4) Ohio Rules of Civil Procedure
O'Day v. Webb, 29 Ohio St. 2d 215 (1972)
Peters v. The B. & F. Transfer Co., 7 Ohio St. 2d 143 (1966)

* * * * *

EXHIBIT E
APPELLEE'S SUPREME COURT BRIEF

* * * * *

WILLFUL MISCONDUCT

In addition to charging on wanton misconduct, the trial court correctly charged the jury on *willful misconduct.* (R.431)

The judge instructed the jury as follows:

> "*Willful misconduct* is intentionally doing that which is wrong or intentionally failing to do that which should be done. The circumstances must also disclose that the defendant knew or should have known that such conduct would probably cause injury to the plaintiff. Willful misconduct implies an intentional disregard of a clear duty or of a definite rule of conduct; a purpose not to discharge such duty, or a purpose to perform wrongful acts with knowledge of the likelihood of resulting injury. It is purposeful action or purposeful failure to act as differentiated from neglect to act."

Applying the facts in our case to the instruction of *willful misconduct* that was given to the jury, it is quite apparent and obvious that the jury could have returned its verdict on the basis of *willful misconduct* as well as on wanton misconduct.

Taking the charge on willful misconduct sentence by sentence, we will apply the facts of our case.

The first sentence of the charge says, "Willful misconduct is intentionally doing that which is wrong or intentionally failing to do that which should be done." In our case, the defendant knew he was to carry flares and intentionally failed to do so. Therefore, the natural and probable consequence of his failure to carry flares was his inability to set

out flares when the necessity arose as it did in our case.

He also intentionally left his truck parked in the passing lane, which was wrong, and he intentionally failed to remove his truck from that hazardous position because he wanted to protect himself by a police report on the previous accident. Under the circumstances of the case, this also was wrong.

The next sentence is, "The circumstances must also disclose that the defendant knew or should have known that such conduct would probably cause injury to the plaintiff." The defendant testified that he knew his truck was in a dangerous and hazardous position. (R.242) Not only did he have actual knowledge but, being a professional driver for ten (10) years, he should have known that his action and inaction would in all probability cause injury to someone on the highway.

The next sentence says "Willful misconduct implies an intentional disregard of a clear duty or of a definite rule of conduct; a purpose not to discharge such duty, or a purpose to perform wrongful acts with knowledge of the likelihood of resulting injury. It is purposeful action or purposeful failure to act as differentiated from neglect to act." Under Ohio Revised Code §4513.27, truck drivers have a clear duty imposed upon them to carry flares and to set out flares when their vehicle is disabled on the highway. This is a definite rule of conduct required of them for the safety of the motoring public. They have a further duty not to park their truck on the passing lane of a high-speed highway.

Failure to carry flares and to place flares on the highway is an intentional disregard of a clear duty or definite rule of conduct. Leaving his truck on the highway was not inadvertence, it was a purposeful act for his own benefit.

The facts of this case fit squarely within the definition of willful misconduct and there is no doubt that reasonable

minds could differ as to whether the facts constitute willful misconduct.

Bailey v. Brown, 34 OS2d 62, cited by the defendant in his brief in support of his argument, is a perfect example of the distinction between mere negligence and willful misconduct. In that case, the young defendant *inadvertently* made a left turn in front on an oncoming vehicle and collided with that vehicle. He testified that he did not remember seeing the vehicle. This is inadvertence or simple negligence and I feel the court was correct in holding that it was not willful or wanton misconduct. That case in no way is analagous to our case but rather is consistent with the distinction between negligence and willful or wanton misconduct.

In *Payne etc. v. Vance,* 103 OS 59, the third Syllabus states:

> "Willful tort involves the element of malice or ill-will but it is not necessary to show actual malice or ill-will. It may be shown by indifference to the safety of others after knowledge of their danger, or failure after such knowledge to use ordinary care to avoid injury."

Again, the facts in our case would meet the requirements of *Payne v. Vance* and the jury could have found that the defendant Brubaker was guilty of *willful misconduct* as well as wanton misconduct.

TWO ISSUE RULE

On page 431 of the Record, the judge properly charged the jury that the defendant would be liable only for injuries caused by *willful or wanton misconduct* of the defendant. The court went on to define willful misconduct and then

defined wanton misconduct. There is no claim by the defendant that the charge was incorrect or erroneous in any respect.

There are, therefore, two separate and distinct issues in the case regardless of defendant's contention that willfull misconduct did not play any part in the accident which was the subject of the trial and if the *evidence supports a verdict on either willful misconduct or wanton misconduct,* the verdict can be supported on either of the two issues and thus

REASONABLE MINDS CANNOT DIFFER

By virtue of Sec. 50(A)(4) of the Ohio Rules of Civil Procedure, a motion for summary judgment or direct verdict shall

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EXHIBIT F
OPINION, PER LYNCH, J.

[148] JANUARY TERM, 1980. [061 Ohio St. 2d

Dissenting Opinion, per LYNCH, J.

* * * * *

hour, which was a lawful and reasonable rate of speed for this highway. Plaintiff had the right to assume that defendants would obey the laws and would either remove defendants' truck from its dangerous position on the highway or place

warning lights of such brightness or at such a distance from the truck so as to adequately warn approaching motorists (such as plaintiff) of the obstruction in the highway caused by the truck being parked across such highway. In this case defendant Brubaker did not comply with such statutes, and did not warn plaintiff in sufficient time to enable plaintiff to stop his motorcycle at the speed at which he was traveling.

Although the issue is not before this court, the writer believes that there is a serious question of whether plaintiff's negligence was the proximate cause of such accident. Under the facts of this case, the writer's opinion is that the most probable cause of such accident was the action of defendant Brubaker in leaving his operable truck parked sideways across the passing lane of a limited access highway without complying with the statutory requirements of warning approaching traffic by visible lights. The writer concurs with Justice William B. Brown's dissent from the majority opinion on the application of *Hawkins v. Ivy, supra,* on the issue of wanton misconduct to the facts of this case. However, the writer further concludes that such actions of defendant Brubaker were grossly irresponsible and amounted to wilful misconduct.

Defendant Brubaker admitted that he knew that the position of his truck on an unlighted, limited access highway was dangerous and hazardous. In effect, he admitted that the position of his truck on such highway created a situation where there was a great probability that approaching traffic would run into his truck, resulting in serious personal injury, death or damage.

After his first accident, Brubaker had sufficient time to remove his truck from its dangerous position on the highway as he was required to do pursuant to R.C. 4511.68(P). Brubaker made the deliberate decision not to remove his

truck from this highway but to await the arrival of the police whom a witness, who arrived at the scene, summoned on his C.B. radio. R.C. 4549.02 requires a person involved in an ac-

* * * * *

SERVICE

I hereby certify that a copy of the within Motion For Reconsideration and Request for Oral Hearing and attached Brief was served upon Gregory Baron, Esq., attorney for defendants-appellants by depositing same in the U.S. Mail, postage prepaid, this 13 day of February, 1980.

ZIDAR, MORGAN AND TOLARO

By /s/ Alfred J. Tolaro
ALFRED J. TOLARO
Attorney for Plaintiff-Appellee

Supreme Court, U. S.
FILED
JUL 8 1980
MICHAEL RODAK, JR., CLERK

No. 79-1957

Supreme Court of the United States

October Term, 1979

DAVID E. PISEL and EVELYN PISEL,
Petitioners,

vs.

ITT CONTINENTAL BAKING CO. and
ROBERT BRUBAKER,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENTS IN OPPOSITION

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STATEMENT OF THE CASE

Respondents agree in part and disagree in part with the petitioners' statement of the case, including how this case arrived at the Supreme Court of Ohio and the effect of the action which the Supreme Court took.

This case was tried for several days to a jury and at the conclusion of the petitioners' case, a motion by the respondents for a directed verdict was overruled by the trial court. The respondents presented no evidence, and the jury eventually returned a verdict for the petitioners.

Respondents appealed on sundry issues, including the failure of the trial court to grant their motion for directed verdict. The Ohio Court of Appeals affirmed. Respondents again appealed to the Supreme Court of Ohio and that Court agreed to hear the case on the sole issue of the propriety of respondents' trial court motion. The Supreme Court ruled in favor of respondents and concluded that their motion at the close of petitioners' case was erroneously overruled, since there were no issues that could properly go to the jury. Petitioners' motion for rehearing, on substantially the same grounds as were presented here, was subsequently denied.

The inaccuracy of petitioners' statement of the case, which carried over to the "questions presented" portion of their Petition, is the suggestion that the so-called "two issue rule" has any application to a ruling on a motion for directed verdict.

ARGUMENT

THE WRIT SHOULD BE DENIED SINCE NO CONSTITUTIONAL ISSUE ARISES FROM THE DECISION BY THE OHIO SUPREME COURT REVERSING THE TRIAL COURT'S DENIAL OF RESPONDENTS' MOTION FOR DIRECTED VERDICT OR BY ENTERING FINAL JUDGMENT FOR RESPONDENTS

The jurisdictional requirements set forth for this Court in 28 U.S.C. §1257 are not met under any reasonable interpretation of the instant case. Petitioners' only contention that there was a denial of due process or deprivation of equal protection lies in the claim that the Supreme Court of Ohio neglected to apply the so-called

"two issue rule" in its consideration of the propriety of respondents' motion for a directed verdict at the close of the petitioners' case. As is amply demonstrated in 4 OHIO JURISPRUDENCE 2d, *Appellate Review* §831, set forth at p. 5b of petitioners' Petition, the two issue rule is a "rule of policy designed to simplify the work of trial courts and to limit the range of proceedings on review." Its primary, and only, application lies in appellate review of such questions as the propriety of portions of a trial court's charge, the admission or exclusion of evidence and such elements which affect only one of several issues in dispute. That situation does not exist in the instant case where the only question before the Supreme Court of Ohio was the propriety of respondents' motion for directed verdict on *all* the issues. In that respect, petitioners' charge that the Supreme Court of Ohio "reversed the lower court's judgment on the jury verdict" is inaccurate since in fact what the Supreme Court did was reverse the rulings of the two lower courts on respondents' motion for directed verdict on *all* the issues. Under those circumstances, *no issue* could be said to have been submitted to the jury "error free" as the two-issue rule requires, since the Supreme Court determined that *no issue* should have been submitted to the jury. Rule 50, OHIO RULES OF CIVIL PROCEDURE.

Petitioners have chosen to adopt an incorrect interpretation of not only the stage of the proceedings which the ruling of the Supreme Court of Ohio affected, but also of the law which the Supreme Court of Ohio had to consider in making its ruling. Their claim of constitutional impingement, which has no validity in any respect, is founded upon the faulty assumption that it was the jury's verdict that was under scrutiny by the Supreme Court of Ohio, and upon the further faulty assumption that the two-issue rule is a concept recognizable under the principles of either due process or equal protection.

CONCLUSION

No constitutional issue having been presented in this case, and no other grounds for review existing, respondents respectfully request that the Petition be denied.

Respectfully submitted,

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APPENDIX

28 U.S.C. §1257

§1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

OHIO RULES OF CIVIL PROCEDURE

Rule 50(A)

(A) Motion for directed verdict.

(1) When made. A motion for a directed verdict may be made on the opening statement of the opponent, at the close of the opponent's evidence or at the close of all the evidence.

(2) When not granted. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts.

(3) Grounds. A motion for a directed verdict shall state the specific grounds therefor.

(4) When granted on the evidence. When a motion for a directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue.

(5) Jury assent unnecessary. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.